D L H.

THE

LAWS OF CEYLON

BY

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VOLUME II.

"*Ex his* [nempe legibus] *dignitatem maxime expetendam videmus, cum verus, justus atque honestus labor honoribus, præmiis atque splendore decoratur;* * * * *et docemur non infinitis concertationumque plenis disputationibus, sed auctoritate nutuque legum* * * * *ab alienis mentes, oculos, manus abstinere.*" [*Cicero de Oratore, Lib. I., Cap. 43.*]

COLOMBO:

GEORGE J. A. SKEEN, GOVERNMENT PRINTER, CEYLON.

1904.

PREFACE.

A SEPARATE preface to a second volume of a series is unusual; but the deviation of this volume from the scope and arrangement, and, indeed, the very name and title of the undertaking, of which it is a part, in its original conception, is such as to render a word of explanation necessary. As will be seen from the preface to the first volume, the work was commenced as an attempt at editing—revised, enlarged, and brought up to date—the "Institutes of the Laws of Ceylon" by the late Mr. Justice Thomson. At the very outset I found that that admirable work had become so antiquated by the inevitable influence of the hand of time on law and legislation that it could not be copied with satisfactory result; but I thought that the arrangement of the author in dealing with his subject might be conserved. Every endeavour was made to retain that arrangement in the first volume, but it was found that repetition in this even to that extent would not be advantageous. The arrangement of the contents of this volume is, in the main, that of the later-day text-books on the Roman-Dutch Law, modified by a scheme of my own, the underlying principles of which must be manifest to the average lawyer. The title "Institutes" I have dropped owing to its accustomed association, in the field of legal literature, with handbooks and other compilations intended

as guides to merely the principles of law and jurisprudence; and I have, hence, to appeal to the indulgence of the members of the profession in asking them to reconcile themselves to the "fiction" of this volume being a sister-volume to that already issued.

The object aimed at in the present volume is the issue of an exposition of the Roman-Dutch Law, which is the Common Law of the land, as it stands with us modified by local legislation and local judicial decision. This has become all the more necessary in consequence of the impetus given to the study and application of the Roman-Dutch Law by the action of the Right Hon. Sir JOHN WINFIELD BONSER as Chief Justice of Ceylon, whereby that law has regained in the economy of the administration of justice in the Island its place which it was gradually losing and from which it was in peril of being shunted out altogether. In this view, it has been thought to be unnecessary to encumber this work with the law on subjects* in respect of which the law of England has been introduced into Ceylon, except to the extent of the incidental application of that law to subjects governed by the Common Law of the land.

For the Roman-Dutch Law, pure and simple, I have drawn largely on authors of recognised merit, but it may be found difficult to follow my classification of details. I have, as a rule, gleaned out from the standard works on the Roman-Dutch Law only practical parts of present application; but I have, in some instances, given that law in its integrity—in each event, not necessarily interweaving local modification with the old law, but keeping the two separate; and I have found it necessary sometimes to exhibit the same proposition in the phraseology of more than one author. It is thus possible that the law on any particular subject may be

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* See Vol. I., p. 7.

found interspersed among the contents of several pages. The reason for this method of treatment must be obvious to the lawyer who makes a careful study of the book, having in view the diffuse state into which the Common Law of this Island has drifted. Without, therefore, pausing to explain it, I might say that the reader in search of authority would do well to run his eye over *all* the sub-headings under any particular title or subject, with reference to which he is seeking information, in the very full index I give at the end of the book.

It is necessary to mention that, of the authorities I have cited, the quotations from Pothier, who, as is well known, is a writer on the Roman Law as it obtained in France are such as may safely be assumed to be based on such portions of the *Corpus Juris Civilis* as have found acceptance in Dutch Jurisprudence also; and most of the propositions that I have laid down mentioning Burge only as my authority are also such as have been drawn by that author from the same source.

In submitting this volume to the public I take the opportunity of expressing my indebtedness to Government for the encouragement I have received at its hands from the commencement of the present undertaking under the auspices of our late Governor, the Right Hon. Sir WEST RIDGEWAY. I have also to thank, not for the first time, for kind suggestion and counsel, the Hon. Sir CHARLES PETER LAYARD, Chief Justice, to whom I have been allowed the privilege of dedicating this work.

This volume, I need hardly say, has been prepared by me under the pressure of professional engagements; and I hope that its imperfections and shortcomings may, therefore, be looked at by the public with an indulgent eye.

WALTER PEREIRA.

Colombo, August 15, 1904.

ERRATA.

Page 24, line 16 from top, for "restored" read "resorted."

Page 34, line 7 from bottom, delete semicolon.

Page 336, marginal notes, line 1 from top, for "Further" read "Fourth."

Page 431, marginal notes, line 11 from top, for "Pawnee" read "Pawnor."

Page 432, marginal notes, line 8 from top, for "mortgage" read "mortgagee."

Page 519, marginal notes, line 5 between "proof" and "of" insert "in absence."

Page 590, line 2 from bottom, for "*tanot*" read "*tanto.*"

Page 648, marginal notes, line 4 from top, between "crime" and "of" insert "in respect."

Page 655, line 10 from bottom, for "Vel." read "Vil."

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LIST OF ABBREVIATIONS.*

A. & E.—Adolphus and Ellis. Q. B.
[1891] A.C.—Law Reports, Appeal Cases [1891 onwards].
A. C.—*See* App. Ca.
Addams, Ecc.—Addams, Ecclesiastical.
Ad [or in *not. ad*]—in his notes on a passage.
Agra, F. B.—Reports, &c., containing Full Bench Rulings, Agra.
Agra.—Reports of the High Court of Judicature for the North-Western Provinces, by M. H. and L. L. Pershad, vols. I.-IV., Agra.
Ag. Stat. Fr.—Agnew on the Statute of Frauds.
Aleyn.—Aleyn's Reports. K. B.
Amb.—Ambler's Reports. Ch.
And.—Anderson's Reports. C. P.
Andr.—Andrew's Reports. K. B.
Ans.—Anson on the Law of Contract. 9th Edition.
Ans. or Anstr.—Anstruther's Reports. Ex.
App. Ca. or A. C.—Buchanan's Reports of the Court of Appeal. Cape Colony.
App. Cas.—Law Reports, Appeal Cases [1876-1890].
Arg. [*arguendum*]—It may be inferred from.
Arn.—Arnold's Reports. C. P.
Arn. and H.—Arnold and Hodges. Q. B.
Asp. M. C.—Aspinall, Maritime Cases.
Atk.—Atkyn's Reports. Ch.
Aus. or Aust.—Austin's Reports [Ceylon].
B.—Burge's Commentaries on Foreign and Colonial Law.
Bac. Ab.—Bacon's Abridgment.
Ball & B.—Ball and Beatty. Ch. [Ireland]
B. and Ad.—Barnewall and Adolphus. K. B.
B. & Ald.—Barnewall and Alderson. K. B.
B. &. C.—Barnewall and Cresswell. K. B.
B. & S.—Best and Smith. Q. B.
Bar. & Arn.—Barron and Arnold. Election.
Bar & Au.—Barron and Austin. Election.
Barnard. Ch.—Barnardiston. Chancery
Barnard. K. B.—Barnardiston. K. B.
Batty—Batty. K. B. [Ireland].
B. C. C.—Lowndes and Maxwell, Bail Court Cases.
B. C. Rep.—Saunders and Cole, Bail Court Cases.
Beat.—Beatty. Ch. [Ireland].
Beav.—Beavan. Rolls Court.
Bell, C. C.—Bell. Crown Cases.
Ber. tr. Voet.—Berwick's Translation of Select Titles of Voet's Commentary on the Pandects.
Bev.—The [Indian] Land Acquisition Acts by Beverley.
B. H. C.—Reports of Cases decided in the High Court of Bombay, 1867-1875.

* In this List are included, for the convenience of practitioners, abbreviations used in the first volume and those of common occurrence in law books.

Bing.—Bingham's Reports. C. P.
Bing. [N. C.].—Bingham's New Cases. C. P.
Bl. by Harg.—Blackstone's Commentaries, edited by Hargreaves.
Bl.or Bl.Com.—Blackstone's Commentaries,edited by Joseph Chitty.
Bligh.—Bligh's Reports. House of Lords.
B. L. R. A. C.—Bengal Law Reports, Appeal Cases.
B. L. R.—Bengal Law Reports.
B. L. R. [F. B.].—Full Bench Rulings of the High Court at Fort William. Calcutta, 1874.
B. N. C.—Brook's New Cases. K. B.
Bom.—Bombay High Court Reports, 1862–1875.
Bos. & P.—Bosanquet and Puller. C. P.
Bos. & P. [N. R.].—Bosanquet and Puller. New Reports. C. P.
Bott. P. L.—Bott's Poor Laws.
Bouln.—Reports of Cases in the Supreme Court at Fort William, by C. Boulnois.
Bourke—Reports of Cases in the High Court of Judicature at Fort William, by W. M. Bourke.
Br.—*See* Br. Rep.
Br. & B.—Broderip and Bingham. C. P.
Br. & Lush.—Browning and Lushington. Adm.
Bro. C. C.—Brown. Chancery Cases.
Bro. P. C.—Brown. Cases in Parliament.
Br. Op. Grot.—Bruyn's Opinions of Grotius.
Brouw.—Brouwer, *De Jure Connubiorum*.
Br. Rep. or Br.—Browne's Reports [Ceylon].
Buch.—Buchanan's Supreme Court Reports, Cape Colony.
Buck.—Buck's Reports. Bankruptcy.
Bull. N. P.—Buller's Law of Nisi Prius.
Bulst.—Bulstrode. K. B.
Bunb.—Bunbury. Ex.
Burr.—Burrows. K. B.
Burr. S. C.—Burrows. Settlement Cases.
Cab. & E.—Cababe and Ellis. Nisi Prius.
Cald. S. C.—Caldecott. Settlement Cases.
Cal. L. R.—Calcutta Law Reports, 1877–1884.
Camp.—Campbell. Nisi Prius.
C. & J.—Crompton and Jervis. Ex.
C. & M.—Crompton and Meeson. Ex.
Car. & K.—Carrington and Kirwan. Nisi Prius.
Car. & M.—Carrington and Marshman. Nisi Prius.
Car. & P.—Carrington and Payne. Nisi Prius.
Cart.—Carter. C. P.
Carth.—Carthew. K. B.
Cary—Cary's Reports. Ch.
Cas. t. Hardw.—Cases *temp.* Hardwicke. K. B.
Cas. t. Talb.—Cases *temp.* Talbot. Ch.
C. B.—Common Bench Reports.
Cens. For.—The *Censura Forensis*, by Simon van Leeuwen. [De H. Ed.—De Haas's Edition.]
Cey.L.Rev.—Ceylon Law Review, edited by Isaac Tambyah, Advocate.
Ch.—Chitty on Prerogative.
[1891] Ch.—Law Reports, Chancery [1891 onwards].
Chalmer's [or Chal.] Col. op.—Chalmer's Opinions of Eminent Lawyers.
Ch. Cas.—Cases in Chancery.
Ch. Cas. Ch.—Choice Cases in Chancery.
Ch. D.—Law Reports, Chancery [1876–1890].
Chit.—Chitty's Reports. Bail Court.
Ch. Pre.—Precedents in Chancery.

Ch. Rep.—Reports in Chancery.
Cl. & F.—Clark and Finelly. H. L.
Clark's Col. L.—Clark's Summary of Colonial Law.
C. L. J.—Cape Law Journal. Now, The South African Law Journal
C. L. R.—Ceylon Law Reports.
C. M. & R —Crompton, Meesen, and Roscoe. Ex.
Code or C.—The Code of Justinian, sometimes cited thus—l. *ab Anastasio* 23, § 1 C. *mandati*—meaning the title *mandati* extract 23 commencing *ab Anastasio* and section 1 of that extract.
C. O. L.—Colonial Office List for 1898.
Coll. C. C.—Collyer, Ch.
Colles—Colles' Cases in Parliament.
Colt.—Coltman, Registration.
Com. ad Pand.—Voet's Commentary on the Pandects.
Comb.—Comberbach. K. B.
Com. L. R.—Common Law Reports [1853-1855].
Comyns—Comyns' Reports. K. B.
Con. & L.—Connor and Lawson. Ch. [Ireland].
Consult, *Advys*. *Hollandsche Consultatien en advijsen* [Dutch Consultations, &c.].
Cooper.—Cooper's Reports. Ch.
Coop. t. Brough.—Cooper, Cases *temp.* Brougham.
Coop. t. Cott.—Cooper, Cases in Chancery *temp.* Cottenham.
Co. Rep.—Coke's Reports. K. B.
Coryton—Coryton's Reports, High Court, Calcutta, 1862-1863.
Cowp.—Cowper. K. B.
Cox, C. C.—Cox, Crown Cases.
Cox.—Cox's Reports. Chancery.
C. P. Cooper.—C. P. Cooper's Reports. Ch.
C. P. D.—Law Reports. Common Pleas Division [1875-1880].
Craw. & D.—Crawford and Dix [Ireland].
Cr. & Ph.—Craig and Philips. Ch.
Creasy—Creasy's Reports [Ceylon].
C. R. C.—Campbell's Ruling Cases.
C. Rob.—Sir C. Robinson. Adm. [1798-1808].
Ct. of Sess. Cas.—Court of Session Cases [Scotland].
C. T. R.—The Cape Times Reports of the Supreme Court of Cape Colony [Sheil's Reports].
Curt.—Curteis. Eccl.
d [*dictus*].—the aforesaid.
D. & L.—Dowling and Loundes. Practice Cases.
D. & R.—Dowling and Ryland. K. B.
Daniell—Daniell's Reports. Ex. Eq.
Dans. & Ll.—Danson and Lloyd. Mercantile.
Dav. & M.—Davison and Merivale. Q. B.
Deac.—Deacon. Bky.
Deac. & C.—Deacon and Chitty. Bky.
Dears. & B.—Dearsley and Bell. Crown Cases.
Dears. C. C.—Dearsley, Crown Cases.
De G.—De Gex. Bky.
De G. & J.—De Gex and Jones. Ch. App.
De G. & Sm.—De Gex and Smale. Ch.
De G. F. & J.—De Gex, Fisher and Jones. Ch. Appeals.
De G. J. & S.—De Gex, Jones and Smith. Ch. App.
De G. M. & G.—De Gex, Macnaghten and Gordon. Ch. App.
Den C. C.—Denison, Crown Cases.
Dic.—Dicey on the Conflict of Laws.
Dick.—Dickens. Ch.
Dig. or D.—The Digest or Pandects of Justinian sometimes cited thus—"Dig. VII. 1. 33 (1)."

d. l [*dicta lege*].—in the *lex* above-mentioned
d. libr. [*dicto libro*] in the book aforesaid.
d. ll. [*dictis legibus*]—in the *leges* aforesaid.
d. loco [*dicto loco*]—in the passage aforesaid.
D. [N. S.]—Dowling—Practice Cases. New Series.
Dod.—Dodson. Adm.
Dougl.—Douglas. K. B.
Dow.—Dow's Reports. H. L.
Dow & Cl.—Dow and Clark. H. L.
D. P. C.—Dowling. Practice Cases
Dr.—Drury. Ch. [Ireland].
Dr. & Sm.—Drewry and Smale. Ch.
Dr. & Wal.—Drury and Walsh. Ch. [Ireland].
Dr. & War.—Drury and Warren. Ch. [Ireland].
Drew.—Drewry. Ch.
Drink.—Drinkwater. C. P.
Dyer.—Dyer's Reports. K. B.
East—East's Reports. K. B.
East P. C.—East's Pleas of the Crown.
E. D. C.—Eastern Districts' Court Reports, Cape Colony.
Eden—Eden's Reports. Ch.
Edwards—Edwards' Reports. Adm.
El. & Bl.—Ellis and Blackburn. Q. B.
El. &. El.—Ellis and Ellis. Q. B.
El. Bl. & El.—Ellis, Blackburn and Ellis. Q. B.
Eq. Ca. Abr.—Equity cases abridged.
Eq. R.—Equity Reports [1853–1855].
Esp.—Espinasse. Nisi Prius.
Ev. Ord.—The Ceylon Evidence Ordinance, 1895. [No. 14 of 1895].
Ex. D.—Law Repo ts, Exchequer Division [1875–1880]
Ex.—Exchequer Reports [1848–1856].
F.—*See* Foord.
Falc. & F.—Falconer and Fitzherbert. Election.
F. & F.—Foster and Finlason. N. P.
fere in pr. [*fere in præmio*]—almost at the beginning of the Chapter or section, &c., referred to.
ff.—A symbol of doubtful origin indicating a title of the Pandects or Digest, cited thus—*l. si Titio* 33, § 1 *in fine ff. de usufructu et quemad. quis utatur*—meaning the title *de usufructu*, &c., extract or *lex* 33 beginning *si Titio*, and towards the end of section 1 of that extract.
Fitzg.—Fitzgibbon. K. B.
Fl. & K.—Flanagan and Kelly. Rolls [Ireland].
Fonb. [N. R.]—Fonblanque. Bky.
Foord or F.—Foord's Supreme Court Reports, Cape Colony.
Forrest—Forrest's Reports. Ex.
Fort.—Fortescue. K. B.
Foster—Foster's Reports. Crown Cases.
Fox—Fox's Reports. Registration.
Free. C. C.—Freeman. Ch.
Free. K. B.—Freeman. K. B.
Fulton—Reports of cases in the Supreme Court of Judicature at Fort William, Calcutta. by J. W. Fulton, 1845.
Gale—Gale's Reports. Eccl.
Galv.—M. A. Galvanus, *de usufructu*.
G. & D.—Gale and Davison. Q. B.
G. Cooper—G. Cooper's Reports. Chancery.
Giff—Giffard. Ch.
Gilb. Eq.—Gilbert. Ch.
Glyn & J.—Glyn and Jameson. Bky.

Godb.—Godbolt. K. B.
Gow—Gow's Reports. Nisi Prius.
Gren Rep. or Gren.—Grenier's Reports [Ceylon].
Groen. *de leg. ab.* Groenewegen, *De legibus abrogatis.*
Grot. *de jur bel. et pac.*—Grotius *de jure belli ac pacis.*
Grot.—Grotius' Introduction to Dutch Jurisprudence.
Herb. tr.—Herbert's translation.
Maas. tr. Maasdorp's translation.
Hag. Adm.—Haggard. Adm.
Haggard Cons.—Haggard. Consistory.
Hag. Ecc.—Haggard. Eccl.
Hall & Tw.—Hall and Twells. Ch.
H. & C.—Hurlstone and Coltman. Ex.
H. & H.—Horn and Hurlstone. Ex.
H. & M.—Hemming and Miller. Ch.
H. & N.—Hurlstone and Norman. Ex.
H. & R.—Harrison and Rutherford. C. P.
H. & W.—Harrison and Wollaston. Bail Court.
Hardr.—Hardres. Excheq.
Hare—Hare's Reports. Ch.
Hawk, P. C.—Hawkins's Pleas of the Crown.
Hay. & J.—Hayes and Jones. Ex. [Ireland].
Hayes—Hayes' Reports. Ex. [Ireland].
H. Bl.—H. Blackstone. C. P.
H. L. Cas.—House of Lords cases.
Hob.—Hobard. K. B.
Hodges—Hodges' Reports. C. P.
Hog.—Hogan. Rolls [Ireland].
Hol. Jur.—Holland's Elements of Jurisprudence.
Holl. Cons.—Hollandsche Consultatien en Advijsen. [Dutch Consultations, &c.]
Holt Eq.—Holt's Reports. Eq.
Holt N. P.—Holt's Reports. Nisi Prius.
Holt—Holt's Reports. K. B.
Hopw & C.—Hopwood and Coltman. Registration.
Hopw. & P—Hopwood and Philbrick. Registration.
h. t. [*hugus tituli*]—of this title, i.e., title under which a *lex* of the Digest is cited in a Commentary.
Huber—Huber, *Observationes rerum Judicatarum.*
Hunt. Rom. Law—Hunter's Roman Law.
Hurl. & W.—Hurlstone and Walmsley. Ex.
I. L. R. All.—Indian Law Reports. Allahabad Series.
I. L. R. Bom.— do. Bombay Series.
I. L. R. Calc.— do. Calcutta Series.
I. L. R. Madr.— do. Madras Series.
Ind. Jur. N. S.—The Indian Jurist, New Series.
Inst.—Institutes of Justinian.
Ir. Ch. R.—Irish Chancery Reports [1850–66].
Ir. C. L. R.—Irish Common Law Reports [1850–66].
Ir. Eq. R.—Irish Equity Reports.
[1894] Ir. R.—Irish Law Reports [1894 onwards].
Ir. R. C. L.—Irish Reports. Common Law [1866–78].
Ir. R. Eq.—Irish Reports. Equity [1866–78].
Jacob—Jacob's Reports. Ch
J. & H.—Johnson and Hemming. Ch.
J. & W.—Jacob and Walker. Ch.
Jenk.—Jenkins. Ex.
J. Kelyng—Sir J. Kelyng. Crown Cases.
Jo. & Lat.—Jones and Latouche. Ch. [Ireland].
Johns.—Johnson. Ch.

Jones—Jones's Reports. Ex. [Ireland].
Jones & C.—Jones and Carey. Ex. [Ireland].
Jos. & Bev.—Reports by Joseph and Beven [Ceylon].
J. P.—" The Justice of the Peace."
Jur.—The Jurist.
Juta—Juta's Supreme Court Reports [S. Afr.]
K. & G.—Keane and Grant. Registration.
K. & J.—Kay and Johnson. Ch.
Kay—Kay's Reports. Ch.
Keb.—Keble. K. B.
Keen—Keen's Reports. Rolls Court.
Keil.—Keilway. K. B.
Kel.—Kelyng, Sir John. K. B.
Ken.—Kenyon. K. B.
Kotze & Barber [Tr.]—Supreme or High Court of the Transvaal Reports by Kotze and Barbar.
Kotze [Tr.]—High Court of the Transvaal Reports by Kotze.
Knapp—Knapp's Reports. P. C.
Knapp & O.—Knapp and Ombler. Election.
l. [*lex*]—a term applied to the separate extracts in the Digest.
L. & C.—Leigh and Cave. Crown Cases.
L. & M.—Lowndes and Maxwell. Bail Court.
Latch—Latch's Reports. K. B.
Lawrence—Lawrence's High Court of Griqualand Reports.
Ld. Raym.—Lord Raymond. K. B.
Leach. C. C.—Leach. Crown Cases.
Let. Pat.—Letters Patent.
Lev.—Levinz. K. B.
Lewin C. C.—Lewin. Crown Cases.
Lit. Rep.—Littleton. C. P.
L. J.—The Law Journal.

L. J. Ch.—	Law Journal,	Chancery	From 1831 onwards.
,, Bk.—	do.	Bankruptcy	
,, C. P.—	do.	Common Pleas	
,, Ex.—	do.	Exchequer	
,, M. C.—	do.	Magistrate's Cases	
,, Q. B.—	do.	Queen's Bench	
,, P. C.—	do.	Privy Council	
,, P. & M.—	do.	Probate and Matrimonial	
,, P.—	do.	Probate, Divorce and Admiralty	
,, Adm.—	do.	Admiralty	
,, Ecc—	do.	Ecclesiastical	

L. J. [o. s.] Ch., K. B. &c.—Law Journal Reports old series, 1822—1831.
Ll. & G.—Lloyd and Goold. Ch. [Ireland].
L. M. & P.—Lowndes, Maxwell, and Pollock. Bail Court.
Lofft—Lofft's Reports. K. B.
Longf. & T.—Longfield and Townsend. Ex. [Ireland.]
Lor. Rep. or Lor.—Lorenz's Reports [Ceylon].

L. R. H. L.	Law Reports 1866 to 1875 inclusive.
L. R. P. C.	
L. R. Ch.	
L. R. Eq.	
L. R. Q. B.	
L. R. C. P.	
L. R. Ex.	
L. R. P. & M.	
L. R. A. & E.	
L. R. C. C.	
L. R. H. L. Sc. [Scotch]	

L. R. Ir.—Irish Law Reports, 1879-1893.
L. T.—Law Times. New Series.
l. unic [*lex unica*]—the only extract or paragraph in the Title
Lush.—Lushington. Adm.
Lutw.—Lutwyche. C. P.
Lutw. Reg. Cas.—Lutwyche. Registration.
Mac. & G.—Machnaghten and Gordon. Ch.
Macl. & R.—Maclean and Robinson. Scotch Appeals.
M'Cle.—M'Cleland. Ex.
Macq. H. L.—Macqueen. H. L.
Madd.—Maddock. Ch.
Maine In. Pen. C.—Maine's Indian Penal Code.
Man. & G.—Manning and Granger. C. P.
Man. & Ry.—Manning and Ryland. K. B.
M. & H.—Murphy and Hurlstone. Ex.
M. M.—Moody and Malkin. Nisi Prius.
M. & P.—Moore and Payne. C. P.
M. & Rob.—Moody and Robinson. Nisi Prius.
M. & S.—Maule and Selwyn. K. B.
M. & Sc.—Moore and Scott. C. P.
M. & W.—Meeson and Welsby.
Manson.—Manson's Reports. Bkty. and Winding-up.
Marshall—Marshall's Reports. C. P.
Marsh. Judg.—Marshall's Judgments [Ceylon].
M. C. C.—Moody. Crown Cases.
M'Cle & Y.—M'Cleland and Young. Ex.
Menzies.—Menzies' Supreme Court Reports, Cape Colony.
Meg.—Megone. Company cases.
Mer.—Merivale. Ch.
Mod.—Modern Reports.
Moll.—Molloy Ch. [Ireland].
Mont.—Montagu. Bky.
Mont. & Ayr.—Montagu and Ayrton. Bky.
Mont. & B.—Montagu and Bligh. Bky.
Mont. & C.—Montagu and Chitty. Bky.
Mont. & M'Ar.—Montagu and M'Arthur. Bky.
Mont. D. & D.—Montagu, Deacon, and De Gex. Bky.
Montan.—P. Montanus. *De jure tutelarum.*
Moore.—Moore's Reports. C. P.
Moore Ind. App.—Moore. Indian Appeals.
Moore. P. C.—Moore. Privy Council.
Mor. Eng. & R.-D law.—English and Roman-Dutch Law by Morice—being a statement of the differences between the Law of England and the Roman-Dutch Law.
Mor. Dig.—Morgan's Digest [Ceylon].
Morrell.—Morrell's Reports. Bky.
Moseley.—Moseley's Reports. Ch.
Myl. & Cr.—Mylne and Craig. Ch.
Myl. & K.—Mylne and Keen. Ch.
N. & M.—Neville and Manning. K. B.
N. &. P.—Neville and Perry. K. B.
Nelson.—Nelson's Reports. Ch.
New Sess. Cas.—New Sessions Cases.
Nat. R. L. or N. L. R.—Natal Law Reports.
N. L. R.*—New law Reports [Ceylon].
Nov.—*Novellæ* or Novels of Justinian.

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* Cases in these Reports as far as p. 102 of Vol. VII. are noted in this work.

N. R.—New Reports, 1662–1865.
N. W. P.—Reports of Cases of the High Court, North-Western Provinces, Allahabad, 1873–1875.
num. [*numero*]—In the number or paragraph.
num. ult. [*numero ultimo*]—In the last number.
Odg. Lib. & Sl.—Odger on the Law of Libel and Slander.
Off. Rep.—Official Reports of the High Court of Transvaal.
O'Kin Com. } Justice O'Kinealy's Commentary on the Indian
O'Kin } Code of Civil Procedure.
O'M. & H.—O'Malley and Hardcastle. Election.
O. R.—An Order and Rule under the Judicature Acts.
[1891] P.—Law Reports, Probate [1891 onwards].
Pand.—Pandects or Digest of Justinian.
P. & D.—Perry and Davison. K. B.
P. & K.—Perry and Knapp. Election.
P. D.—Law Reports, Probate Division [1876–1890].
Peake, Add. C.—Peake, Additional Cases. Nisi Prius.
Peake, N. P.—Peake's Reports. Nisi Prius.
pen. [*penultimo*]—In the last number [*lex*, &c.] but one
Ph.—Phillips. Ch.
Phillim.—Phillimore. Eccl.
Pol.—Pollexfen. K. B.
Pop.—Popham. K. B.
post med. [*post medium*]—After the middle, *i.e.*, in the latter half of a section.
Poth.—Pothier's Treatise on the Law of Obligations—arranged in Parts, Chapters, Sections, Articles, and Paragraphs, and cited accordingly.
Poth. Ev. tr.—Evan's translation of Pothier on Obligations.
pr. [*præmium*]—A term applied to the initial paragraph—which is never numbered—of a title in the Institutes or of a *lex* in the Digest.
Price—Price's Reports. Ex.
P. Wms.—Peere Williams. Ch.
Q. B.—Queen's Bench Reports [1841–1852].
Q. B. D.—Law Reports, Queen's Bench Division [1876–1890].
[1891] Q. B.—Law Reports, Queen's Bench [1891 onwards].
R.—The Reports, 1893–1895.
Railw. Cas.—Railway and Canal Cases [1835–1854].
Ram. Rep. } Ramanathan's Reports [Ceylon].
Ram. }
R. & R.—Revised Rules and Regulations for Her Majesty's Colonial Service as published in the Colonial Office List for 1898.
R. & R.—Russell and Ryan. Crown Cases.
Raym. [Ld.].—Lord Raymond. K. B.
R.-D. L. in S. A. by Bissch.—A pamphlet on the Roman-Dutch Law in South Africa by Bisschop.
Rep. Ch.—Reports in Chancery.
Ridg. L. & S.—Ridgway, Lapp, and Schoales. K. B. [Ireland].
Ridgw.—Ridgway. Parliamentary Cases.
Roden. Conjug.—Rodenburg *De Jure Conjugum*.
Rol. Abr.—Rolle's Abridgment.
Rolle—Rolle's Reports. K. B.
Roscoe—Roscoe's Supreme Court Reports, Cape Colony.
Rose—Rose's Reports. Bky.
R. R.—Revised Reports.
Russ.—Russel's Reports. Ch.
Russ. & M.—Russel and Mylne. Ch
Ry. & Can. Traff. Cas.—Railway and Canal Cases [1874 onwards].

Ry. & M.—Ryan and Moody. Nisi Prius.
S. A. L. J.—The South African Law Journal.
Salk.—Salkeld. K. B.
Saund.—Saunders. K. B.
Sande, *de Proh al.*—Saude, *de prohibitione alienationis.*
Sand. Just.—Justinians Institutes translated and commented on by Sanders.
Sau. & Sc.—Sausse and Scully. Rolls Ct. [Ireland].
Sayer—Sayer's Reports. K. B.
S. C.—Supreme Court Reports, Cape Colony, by Juta, Tredgold, and Buchanan.
S. C. C.—Supreme Court Circular [Ceylon].
S. C. Civ. Min.—Civil Minutes of the Supreme Court of Ceylon.
Sch. & Lef.—Schoales and Lefroy. Ch. [Ireland].
Scott—Scott's Reports. C. P.
Scott [N. R].—Scott, New Reports. C. P.
S. C. R.—Supreme Court Reports [Ceylon].
S. C. R. [S. Afr].—Supreme Court Reports [Tredgold and Buchanan].
Searle—Searle's Supreme Court Reports, Cape Colony.
Select Ca. Ch.—Select Cases in Chancery.
Selw. W. P.—Selwyn, Law of Nisi Prius.
Sheil or Sh.—Cape Times Law Reports by Sheil.
Shower.—Shower's Reports. K. B.
Shower. P. C.—Shower. Parliamentary Cases.
Sid.—Siderfin. K. B.
Sim.—Simons. Ch.
Sim. & S.—Simons and Stuart. Ch.
Sim. & G.—Smale and Giffard. Ch.
Smith.—Smith's Reports. K. B.
Smith.—Smith's Reports. Registration.
Sm. L. C.—Smith's Leading Cases.
Somer.—J. A. Someren. *De Jure Novercarum.*
Spinks.—Spink's Reports. [Adm].
Stårk.—Starkie. Nisi Prius.
Stokes' Com.—Stokes' Commentary on the Indian Codes.
Str.—Strange. K. B.
St. Tri.—State Trials.
Styles.—Styles's Reports. K. B.
Swa.—Swabey. Adm.
Sw. & Tr.—Swabey and Tristram. Probate.
Swanst.—Swanston. Ch.
Suth.—The Weekly Reporter, Appellate High Court, by D. Sutherland, Calcutta
Suth. R.—Sutherland's Reports of decisions of the Appellate High Court, from January to July, 1864.
Tam.—Tamlyn. Rolls Court.
Tam. Rep. / Tamb. }—Tambyah's Reports. [Ceylon].
T. & M.—Temple and Mew. Crown Cases.
Taunt.—Taunton. C. P.
Tay. on Ev.—Taylor on Evidence.
Term. Rep.—Durnford and East, Term Reports. K. B.
Throop.—Throop's Edition of the New York Code.
tit [*titulo*]—in the title.
T. Jones.—Sir T. Jones. K. B.
tot. tit [*toto titulo*]—in the whole title.
T. Raym.—Sir T. Raymond. K. B.
Tothill.—Tothill's Reports. Ch.
Turn. & R.—Turner and Russell. Ch.

Tyrw.—Tyrwhitt. Ex.
Tyrw. & G.—Tyrwhitt and Granger. Ex.
Vand.—Vanderstraaten's Reports. [Ceylon].
V. & B.—Vesey and Beams. Ch.
V. D. K. [Th.]—Vander Keessel. *Theses Selectæ.*
Lor. tr.—Lorenz's translation.
V. D. L—Vander Linden's Institutes of the Laws of Holland.
Hen. tr—Translation by Henry.
Jut. tr.—Translation by Juta.
Ventris—Ventris's Reports. K. B.
Vern.—Vernon. Ch.
Vern. & S.—Vernon and Scriven. K. B.
Verr.—P. Verryn, *De Emptione et Venditione.*
versu—in the line [beginning with the words following].
Ves.—Vesey, Jun. Ch.
Ves. Sen.—Vesey, Sen. Ch.
Vin. ab.—Viner's Abridgment.
V. L.—Van Leeuwen's Commentary on the Roman-Dutch Law.
Kot. tr.—Translation by Kotze.
Voet / Voet *ad Pand.* }—Voet's Commentary on the Pandects.
W. Bl.—Sir William Blackstone's Reports. K. B.
Wendt—Wendt's Report [Ceylon].
West.—West's Reports. H. L.
Wh. Law Lex.—Wharton's Law Lexicon.
Wightw.—Wightwick. Ex.
Willes.—Willes's Reports. C. P.
Will. on Ex.—Williams on the Law of Executors and Administrators.
Wilmot.—Wilmot's Notes. K. B.
Wils. Ch.—Wilson. Ch.
Wils. Ex.—Wilson. Ex.
Wils. K. B.—Wilson. K. B.
W. Jones.—Sir W. Jones. K. B.
W. Kelynge.—Sir W. Kelynge. Ch.
Wms. Saund.—Williams' Saunders. K. B.
W. N.—Weekly Notes [Indian] from 1865.
W. R.—Weekly Reporter. [English].
W. R.—Weekly Reporter [Indian], Appellate High Court by D. Sutherland, Calcutta.
W. R. [F. B.]—Special Number of Sutherland's Weekly Reporter containing Full Bench Rulings, Calcutta.
W. Rob.—W. Robinson. Adm. [1838-1847].
W. W. & D.—Wilmore, Wollaston and Davison. K. B.
W. W. & H.—Wilmore, Wollaston, and Hodges. K. B.
Y. & C.—Young and Collyer. Eq. Ex.
Y. & C. C. C.—Younge and Collyer. Ch.
Y. & J.—Young and Jervis. Eq.
Yelv.—Yelverton. K. B.
Younge.—Younge's Reports. Ex. Eq.

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3 C. L. R., p. 93–49.

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2 Lor. 41–212 ; 106–492 : 114–430 ; 115–182 ; 122–679.

3 Lor. 28–455 ; 30–476 : 33–308 ; 45–323 ; 80–307 ; 115–757 ; 125–389 ; 161–182 : 175–559 ; 207–117 ; 235–89 ; 235–298 ; 250–430 ; 251 308 ; 254–628.

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2 N. L. R. 276–49.

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THE LAWS OF CEYLON.

THE

LAWS OF CEYLON.

VOLUME II.

INTRODUCTORY.

THE Common Law of Ceylon is the Roman-Dutch Law as it obtained in the Netherlands about the commencement of the last century. The Roman-Dutch Law is an offshoot, so to say, of the Roman Law: it is, in fact, comprised of the Roman, or, as it is also called, Written or Civil Law, and of such Ordinances and Edicts as the supreme authority in Holland from time to time enacted [see Vol. I., p. 13]; and, inasmuch as this volume, as explained in the Preface, is practically a treatise on the jurisprudence of Holland* as it stands with us altered, expanded, and explained by local legislation and local judicial decision, a short account of the channels through which that jurisprudence comes to us, and of the different sources of its progenitor, the Roman Law, may not be out of place here.

The Roman-Dutch Law.

* The term "Dutch" is coextensive with the modern Kingdom of the Netherlands and what was in the time of Grotius the Republic of the United Netherlands. We now mean the same by the use of the name "Holland"; but Holland in the time of Grotius was only one of the seven Provinces of the Union. Its other members were Zeeland, Utrecht, Gelderland, Overyssel, Groningen, and Vriesland. [Grot. Maas. Tr., Pref.]

Meaning of the term "Dutch."

Early institutions of Rome from which laws emanated.

The *Populus Romanus*.

The earliest institutions of ancient Rome from which laws emanated were, as is well known, the *Comitia Curiata*, the *Comitia Centuriata*, the *Comitia Tributa*, and the Senate or Council of Elders. The *Populus Romanus* or Body Politic was composed of the burgesses or citizens who engrossed all political rights. They were divided by Romulus into three classes or tribes corresponding, it is probable, to the three cantons of ancient Rome, of the members of which they are supposed to have been, in fact, an amalgamation. Each class or tribe was divided into ten *curiæ*, and they met in their assembly called the *Comitia Curiata* to vote on all matters of State which the king was bound to lay before them. The Senate was a select body for advising the king. It consisted of a hundred members from each of the three *curiæ*. The *Comitia Centuriata* was a popular assembly created by King Servius Tullius, including all citizens—patricians and plebeians alike. It gradually assumed to itself all the political rights which belonged to the curiate assembly, and the plebeians also thus in process of time became members of the *populus*. The *Comitia Tributa* was an assembly composed exclusively of plebeians for the settlement of their own affairs. To these several institutions were due some of the earliest sources of the Roman Law. *Leges* were laws proposed by a Magistrate presiding at the Senate, and adopted by the Roman people in the *Comitia Centuriata*. They related more particularly to public than to private law. The *Plebiscita* were resolutions passed in the *Comitia Tributa* on the motion of the plebeian tribunes. Originally they were binding on the plebeians only, but the consuls, Horatius and Valerius, extended their operation to the whole people. The *Senatus consulta* were decrees of the Senate without the concurrence of the people, and, like the *leges*, had reference generally to the public law. The *leges* and the *plebiscita* continued to be enacted

The *Comitia Curiata*.

The Senate.

The *Comitia Centuriata*.

The *Comitia Tributa*.

***Leges*.**

The *Plebiscita*.

The *Senatus consulta*.

until about the time of Emperor Nerva [96–98 A.D.], when they were superseded by the *Senatus consulta*, which, in their turn, about the time of Emperor Septimus Severus [206 A.D.], completely disappeared, the Imperial Constitutions having gradually taken their place. Custom was another source of Roman Law. This was principally the *mores majorum*, or law which was founded on the manners and customs of ancestors and transmitted to their descendants. A fifth source were the Edicts of the Prætors, and their history is as follows. The proper Roman Law [*jus civile*] was formerly applicable to Roman citizens only; but when the Romans extended their dominion over all Italy and many countries beyond it, their frequent intercourse with non-Romans caused them to institute, in addition to their own national law, a law adapted to the litigation of non-Romans in Rome. This was extracted in part from proper Roman Law, in part from positive laws, and in part was new law; and this law the prætors proclaimed by edicts at the beginning of their official year, each successive prætor adopting in the main the rules of his predecessors; and about 67 B.C. the people's tribune, Cornelius, procured the passage of a law, that every prætor should be bound to administer justice according to his own pre-declared edicts. The law thus instituted was called the *Jus honorarium*. The *Responsa Prudentum* were another source of the Roman Law. These were, generally speaking, responses given by jurisconsults or those learned in the law to magistrates who applied to them in doubtful cases. The jurists were always held in high esteem by the Romans. Every jurisconsult had the right to give his opinion on the law, and, before the time of Augustus, all such responses were of equal authority. They had not the force of law, but were regarded as the opinions of jurists. Augustus was the first to allow, by special grant, several distinguished jurists

Custom, a source of Roman Law.

Edicts of the Prætors.

The *Jus honorarium*. The *Responsa Prudentum*.

to respond in his name, the natural consequence of which was that the opinions given by those specially authorised jurists acquired greater weight and had indeed the full force of law. A further source of the Roman Law were juridical writings. From the Twelve Tables up to the time of Cicero—that is, from 450 to 100 B.C.—there are but few traces of a strictly scientific treatment of the law. The *Tripertita*, termed by Pomponius the cradle of the *jus civile*, was published by Sextus Ælius Cato. There were other writers; but the scientific treatment of the law attained its great excellence, particularly owing to the connection of law with philosophy and Greek literature, during the period between the time of Cicero and that of the Emperor Alexander Severus, 100 B.C. to 250 A.D. In this period lived the most distinguished jurists that ever flourished among the Romans—"men whose clear and penetrating judgment advanced jurisprudence to a high state of perfection and cultivation, and who are therefore usually called the classical jurists." Their writings contained excellent elucidations and developments of the sources of law, and soon obtained a decisive authority in the courts, partly because the authors themselves often occupied the highest dignities of the State, and partly because the assistance of learned interpreters was indispensable in the practical application of the Law of the Twelve Tables and the Edicts. Justinian's Pandects were compiled from the writings of these jurists. Cneius Flavius, Quinctus Mucius Scævola, Granius Flaccus, Aquilius Gallus, Alfenus Varus, and Ofilius Trebatius Testa are a few of the more familiar names of authors before the time of Augustus. The eighth and last source of the Roman Law were the Imperial Constitutions. The term *Constitutiones* embraced all the acts of the emperor, but these were divisible into three distinct classes—first, the *edicta* or general Ordinances promulgated by the emperor;

Juridical writings.

The *Tripertita*.

Roman jurists before Augustus.

The Imperial Constitutions.

secondly, *decreta*, judgments rendered by him in cases which he decided in his tribunal; and thirdly, *mandata*, *epistolæ*, and *rescripta*, which included all acts addressed by him to various persons—to his Lieutenants, the inferior Magistrates, the Prætor or Proconsul who questioned him on doubtful points of law, and to private individuals who petitioned him in any circumstance whatever.

Progress of legal literature under the Emperors. The Proculeian or Pegasian and Sabinian or Cassian schools of law.

The progress of legal literature under the Roman Emperors may be summed up thus. In the time of Augustus flourished the two rival jurists Ateius Capito and Antistius Labeo. Capito is said to have been a man fond of rank, wealth, and influence, and attached to the emperor and existing institutions; while Labeo is credited with great learning, originality, and confidence in his own opinions, and a desire to introduce innovations. In course of time, when the students of these two jurists had themselves become jurists and succeeded their masters, the teachings of the latter were divided into two distinct schools deriving their names, not from them, but from their disciples. The disciples of Labeo were Nerva, Proculus, and Pegasus, and his school of law was called the Proculeian or Pegasian school. The pupils of Capito were Sabinus and Cassius, and his followers hence obtained the name of Sabinians or Cassians. These two schools of law continued for nearly two centuries. The *Lex Julia et Papia Poppæa* was a considerable Code of laws, compiled in the time of Augustus, supposed to be the most extensive after the Twelve Tables, and to have produced a great impression upon society. It treated on the subject of marriage and everything even remotely connected with it, such as betrothal, divorce, dower, inheritance, legacies and their devolutions, *dies cedens*, and the like. In the reign of Adrian was composed the *perpetuum edictum*, which was a methodical arrangement of the prætorian law, that is to say,

The *Lex Julia et Papia Poppæa*.

The *perpetuum edictum*.

the various edicts published up to that time. All that have come down to us of that edict are some scattered fragments in the Pandects of Justinian. Adrian was the first emperor who gave the full force of law to the decisions of authorised jurists in case they were unanimous. An abridgment of the history of law, which is included in the Digest or Pandects, was written by Sextus Pomponius during the reign of Antoninus Pius. To the writings of Gaius is assigned the time of the Emperor Marcus Aurelius [169 A.D.]. The full, or, it may with reason be said, the real name of this illustrious jurist is not known to us. Gaius, which, it is surmised, is a corruption of the common Roman name Caius, was, according to many authors, only his prænomen. He belonged to the school of Capito, and composed numerous works, and took a deep interest in legal history. The subjects upon which he wrote were the Twelve Tables, certain of the Edicts, the *Lex Papia*, and the works of Quintus Mucius Scævola. Very little indeed of these works was known until 1816, when Niebuhr discovered in the library at Verona a palimpsest which, with considerable difficulty, was deciphered by certain scholars appointed for the purpose by the Academy of Berlin, and published in 1820 as the Institutes of Gaius. It is only a digest of the jurisprudence of the time of Antoninus Pius and Marcus Aurelius. Æmilius Papinianus, otherwise known as Papinian, came after Gaius. He lived in the reign of Septimus Severus, and was the most celebrated of all the Roman jurists. The most remarkable of his work is his "Questions, Answers, and Definitions," of which there are a number of fragments in Justinian's Digest. Domitius Ulpianus, commonly called Ulpian, and Julius Paulus, commonly known as Paul, lived in the time of Papinian. The former was a native of Tyre, the latter of Padua. They were rivals in talent and fame, and composed several

The writings of Gaius.

His Institutes.

Papinian.

Ulpian and Paul.

works, of which 2,462 fragments by the former and 2,083 by the latter have been preserved. Gregorianus and Hermogenianus were two jurists of whom and whose works very little is known. They were the authors of the two Codes known as the Gregorian and the Hermogenian Code, which were collections of Imperial rescripts arranged in a certain methodical order. These Codes had no legislative authority, but were treated as merely private collections made by two jurists. Neither of these Codes has been preserved in a complete form. The fragments of the Gregorian Code which have come down to us extend from the Emperor Septimus Severus [196 A.D.] to the Emperors Diocletian and Maximian [296 A.D.]. It is therefore after this date, probably from 296 to 385, that this Code was composed. The fragments of the Hermogenian Code extend from 287 A.D. to 304 A.D. It is to these two collections that the term "Code" was first applied—a word which has since, with the Romans, borne the technical signification of a collection of Imperial Constitutions. Theodosius II., who became emperor in the Western division of the Roman Empire, directed a collection, similar to the Gregorian and Hermogenian Codes, of all the constitutions of Constantine and the succeeding emperors, including himself, commencing from the period when these Codes left off, to be drawn out by two successive commissions under the superintendence of Antiochus, *ex*-Consul and *ex*-Prætorian Prefect. The work was completed after nine years' labour, and it received the Imperial sanction, and was published in the East in the February of 438 under the name of the Theodosian Code, with the injunction that from the calends of January, 439, it was to be the sole source of Imperial Law. The Code, however, was followed by new constitutions designated by the general name of *novellæ*. Of the Theodosian Code we do not possess the whole of the original text. Three documents,

Gregorian and Hermogenian Codes.

The Theodosian Code.

The *novellæ* of Theodosius.

Certain documents containing expositions of the Roman Law.

the precise dates of which are unknown, and which respectively bear the Latin names of *Fragmenta Vaticana*, *Mosaicarum et Romanarum et Legum Collatio*, and *Consultatio veteris cujusdam juris consulti* may here be noticed. The first, supposed to be anterior to the Theodosian Code, was discovered by a librarian of the Vatican, and originally published at Rome in 1823. It consists of a collection of fragments from the works of Roman jurists and from the Imperial Constitutions. The second is a comparison between the Mosaic and the Roman Law, made by an unknown author, at an uncertain date. It was discovered in the sixteenth century, and first published at Paris in 1573. The third is a solution of various legal points by a jurist of the Lower Empire, written after the time of Theodosius, and discovered and published by Cujas in 1577.

After the Eastern Empire of the Romans was subjugated by the Goths or Germans, and the whole of Italy and Gaul, Spain, and some other Roman Provinces came under the Gothic or German Kings, the Romans were allowed to retain their laws, manners, and national customs, and it soon became necessary for the immigrated Germans to commit these laws as well as their own to writing. Alaric II., who became King of the Visigoths of Gaul, published in 506 a Code for the government of the Romans in his Empire, which had been collected by a commission out of the Gregorian, Hermogenian, and Theodosian Codes, the later Novels, and the writings of Gaius, Paul, and Papinian. This compilation has usually been termed the *Breviarium Alaricianum* or *Aniani* from Anian, the private referendary of Alaric. Theodoric, King of the Ostrogoths in Italy, issued his Edict, commonly called the Edict of Theodoric, in 500. The entire substance of the Edict was extracted from the Roman Law; and between 506 and 534 a *Lex Romana* was published for

The Code of Alaric.

Edict of Theodoric.

the Roman subjects in the Burgundian Empire, which became known as *Papiani* (a corruption of *Papiniani*) *responsa* or the Papian Law. Justinian, who became emperor at Constantinople in 527, devoted his attention principally to legislation and the promotion of the study of the law. He first undertook a new collection of the Imperial Constitutions, which was intended as a substitute for the previous collections, and he appointed in the year 528 a commission of ten jurists with very extensive powers, at the head of which he placed the *ex-quæstor sacri palatii*, Johannes, to select all that was useful from the writings of the most authoritative of the older jurists, and to arrange them according to their matter under proper titles. They were given full power to make all such alterations in the writings of the older jurists as were adapted to the times. Full advantage was taken of this power, and large portions of the older writings were suppressed, added to, or re-arranged. The work was completed in three years, and the whole compilation, consisting of extracts from no less than thirty-nine jurists in fifty books, was called the Digest or the Pandects; and the changes in the writings of the older jurists introduced into it, the *interpolationes* or *emblemata Triboniani*. The Pandects were published on the 16th December, 533, and were to have legal authority from the 30th of that month. Justinian, at the same time, forbade the further use of the writings of the older jurists, so as to prevent jurisprudence from again becoming diffuse and uncertain, and he prohibited the writing of commentaries on the new compilation.

The Papian Law.

Justinian's collection of Imperial Constitutions.

The Digest or Pandects.

Even before the preparation of the Digest, Justinian had entrusted to Tribonian, Theophilus, and Dorotheus, Professors of Law, the duty of collecting together the different elementary treatises left by the ancients, and constructing a treatise for students with a simple abridgment of the principles of the laws. The book was extracted chiefly from the elementary treatises of

Gaius, Paul, and Marcian, and published at about the same time as the Pandects under the title of the *Institutiones*. Although it was originally intended for students, it soon acquired the full force of law.

Institutes of Justinian.

His Code.

In 529 Justinian had published a Code of laws for his subjects. Since then he had issued a number of new Constitutions, and had given fifty decisions on contested points of law. He now ordered Tribonian to revise the old Code and to add to it the new Constitutions, and in this work Tribonian was to be assisted by the jurists, Dorotheus, Menna, Constantinus, and Johannes. This new edition of the Code [*Codex repetitæ prælectionis*] was confirmed by Justinian on the repeal of the old Code by the publication, in 533, of the Pandects. Justinian, during the long continuance of his government, after the publication of the new Code, issued at different times a number of new Constitutions whereby frequently entire doctrines of the law were changed. These were issued, partly in Greek and partly in Latin, under the name of the *Novellæ Constitutiones*—called by us the Novels—and collections of them, the largest numbering 168, have been published at different times.

The *Novellæ* of Justinian.

These four works—the Pandects or Digest, the Code, the Institutes, and the Novels—are what are now called the *Corpus Juris Civilis*. This term, strictly speaking, signifies the whole body of the Roman Law as distinguished from the Canon Law; but when we now speak of the *Corpus Juris Civilis*, we would ordinarily be understood as referring to only the compilations of Justinian, namely, the Pandects, the Institutes, the Code, and the Novels. The Latin language, in which these works were written, was not the vernacular of the Byzantines; and translations and commentaries, hence, began to be published even in the time of Justinian. Of these translations and commentaries, the most prominent are the works of Theophilus, Dorotheus,

The *Corpus Juris Civilis*.

Commentaries on the Pandects.

and Stephen on the Institutes; the commentaries of the same authors and of Isidorus, Anastasius, and an anonymous author, supposed to have been Julian, on the Digest; the writings of Anatolius, Isidorus, Thalleleo, Stephen, and Phocas on the Code; and the abridgments by Athanasius and Theodorus of the Novels.

In the Eastern Empire the publication, by Imperial authority, of works on law was briefly as follows. A manual of law now known by the names of *Ecloga Legum* and the "Isaurian Law" was published in 740 by Leo the Isaurian and his son Constantine Copronymus; a second Imperial Manual known by the different names of the *Prochiron*, the "Constitution of Basil," and the "Constitution of the three Emperors," was composed by Basil the Macedonian, his sons, Constantine, and Leo the philosopher [870]; a revised edition of the *Prochiron* under the title of *Epanagoge* [*repetita prælectio*] was issued between 879 and 886 by Basil in conjunction with his sons, Leo the philosopher, and Alexander; and the *Repurgatio veterum legum* or Revision of the Ancient Laws [handed down to us under the title of the *Basilicæ*] was partly executed by Basil and completed [906-911] by Leo the philosopher when associated, probably, with his brother Alexander and his son Constantine. These works were more or less derived from the Institutes, the Digest, the Code, and the Novels. Either immediately after the compilation of the Basilikon or shortly thereafter, probably as an official comment, notes were added to it which are now termed *scholia*.

Legal literature in the Eastern Empire.

The Isaurian Law.

The *Prochiron*.

The *Basilicæ*.

Scholia.

In the west, during the anarchy and confusion of the Middle Ages, law, in common with literature and science, may be said to have made no advance. Two elementary manuals upon the text of Justinian, however, are ascribed to this period—one composed in Italy, the other at Valencia in Dauphiny. The latter is

Progress of law in the Western Empire.

known under the title of *Petri exceptiones legum Romanorum* or, by contraction, the *Petrus*, from its supposed author of that name; and the former is generally known under the title of *Brachylogus totius juris civilis* or, briefly, *Brachylogus*, signifying a short discourse or *prècis*. This is a name arbitrarily given to it in an edition of 1553, its author being unknown. Savigny, however, is of opinion that it was composed at the commencement of the twelfth century, and is disposed to ascribe it to Irnerius, the founder of the School of Bologna which, it may here be noted, was established at the beginning of the twelfth century. Pepo, a Magistrate of Bologna, had given a course of public lectures there, but Irnerius, who followed him, is regarded as the true founder of this once flourishing school. He illustrated the text of Justinian's books by brief annotations on their matter and language, and these annotations were termed glosses from *glossa* or *glosa*, an obscure word signifying explanation. In this method of illustration Irnerius was followed by his pupils and successors in office, whence they were given the name of Glossators. The Glossators sought to illustrate the study of law by inserting extracts from Justinian's Novels in such parts of the Code and the Institutes as were subsequently altered by the Novels. These extracts were termed authentics [*authenticæ*], but are not to be confounded with the complete Novels to which the Glossators applied the same name.

The *Petrus*.

The *Brachylogus*.

The School of Bologna.

Annotations (glosses) of Irnerius.

The Glossators.

The authentics.

The Roman Law, as observed by Chief Justice Tindal, is the groundwork of the Municipal Law of most of the countries of Europe. The observation of a jurist, "*Servatur ubique jus Romanum non ratione imperii sed rationis imperio*," expresses the authority which the jurists of Holland, France, and the other States of Europe ascribe to it. In France, the law which governed the Romans was, as already stated, the *Breviarium Alaricianum*. The Roman Law was used

Progress of the Roman Law in France.

there throughout the whole of the Middle Ages, and as early as the middle of the eleventh century, Lanfranc, Archbishop of Canterbury, is said to have taught Roman Law while Abbot of Bec in Normandy. Placentius, who belonged to the School of Bologna, founded the first French school of law at Montpellier in 1180, and introduced the writings and methods of the Glossators; and among the subsequent French jurists, who, it may here he observed, have written mostly in Latin, the names of Doneau, Godefroi, Cujas, Domat, and Pothier are prominent. Pothier's commentaries on the Pandects of Justinian were the result of twelve years' unremitting labour, and were published from 1748 to 1752. Domat is an authority of great weight when speaking of general principles and the application of these principles to the laws of France; but he is chiefly an exponent of the Roman Law as it obtained in France, and is to be followed with caution on points appertaining to Dutch jurisprudence [see *Arcadie v. Mulder*, Ram. 20–33, p. 72]. The Civil Code, the present Law of France, is based upon the Roman Law. Spain, or a very large portion of it, formed a part of the Roman Empire for nearly six centuries, and during that time, there can be little doubt, the Roman Law was largely administered there. After the conquest of Spain by the Visigoths in 412, Germanic Laws began to displace the then existing laws, and during the Middle Ages, the former were predominant. The School of Bologna, however, spread its influence as far as Spain, and the *Siete Partidas*, the present law, which was promulgated and generally adopted as the law of Spain in the reign of Alonso XI, in 1348, is very largely derived from the Roman Law. In Germany, until some time after the establishment of the University of Bologna, the law administered was of purely German origin, now commonly known as the *leges barbarorum*. The fame of the Professors of Bologna soon extended to Germany, and the Italian

The school of law at Montpellier.

Pothier's commentaries.

Domat.

The Civil Code of France.

The Roman Law in Spain.

The *Seite Partidas*.

The Roman Law in Germany.

The *leges barbarorum*.

universities began to be frequented by the German youth. On their return they naturally endeavoured to introduce into use, and apply in the German tribunals, the Roman Law which they had learned. The German Emperors and territorial lords soon discovered that the Roman Law was more suited than their own to their interests of absolute sovereignty; universities began to be established on the Italian model to which Professors of the Roman Law were appointed; and the Roman Law became gradually and generally introduced into the German Courts, where it has continued to be administered as the Common Law of the land to the present day. The German school of students of Roman Law was founded by Zaze, a humanist. The Humanists, perhaps it should have been observed earlier, were a school of jurists in France, established at the beginning of the sixteenth century, who extended their studies, beyond the legislation of Justinian, to the whole history of the Roman Law from the earliest times, and carried their researches beyond legal documents, into all the works of classical literature. Most of the distinguished professors in Germany in the sixteenth century were foreigners. Among them were Wesembeck, Gilfarius, and Gothofredus. In the eighteenth century, works were written on the philosophy of natural law and legal history by several eminent men, but the one great name of the century was that of Heineccius, whose writings were for a whole century the decisive authority on the external and internal history of law. The historical school of the nineteenth century was founded by Hugo and Savigny, who have been followed by such authors as Niebuhr, Haubold, Mackeldey, Klenze, Muhlenbruch, Zacharia, Puchta, Keller, Warkoning, Dirksen, Rudorff, and Vangerow. In Scotland the teaching of the Civil Law commenced at the Reformation in 1560. Scotland, by

The Humanists.

Professors of Law in Germany.

Heineccius.

School of law founded by Hugo and Savigny.

The Civil Law in Scotland.

reason of the close alliance which had subsisted long between her and France, had already borrowed many of the institutions of the latter country, and imported a large portion of Roman jurisprudence to supply the deficiencies of her own Municipal Law. The Law of Scotland is largely made up of the Roman Law, and such Scottish lawyers and authors as Stair, Barnston, Erskine, and Bell were able Civilians. With regard to the study of Roman Law in England, Blackstone informs us that about the year 1138 Vacarius from the School of Bologna was brought over to England by Theobald, a Norman abbot who had been elected to the See of Canterbury, and placed in the University of Oxford to lecture on the Civil Law. The Civil Law did not, however, receive general approval in England, and its study soon became confined to the clergy, who entirely abandoned that of the Common Law, and banished it from the universities. The study of the Common Law, however, was about the same time taken up by the laity, who, on their part, entertained a most hearty aversion to the Civil Law, and made no scruple to profess their contempt for, and even ignorance of, it in the most public manner. It is difficult to say how much of the Common Law of England was influenced by the Roman Law. Professor Stubbs would have us believe that England has inherited no portion of the Roman legislation, except in the form of scientific or professional axioms introduced at a late period; but the opposite extreme has been expressed by equally eminent writers. Judging, however, from the works of Glanville in the twelfth century, and Bracton and Fleta in the thirteenth, it is clear that, as in Germany, by a long process of custom and not acts of legislation, great portions of the Civil Law have been imported into English jurisprudence.

Roman Law in England.

In Holland, the University of Leyden was founded in 1575, and Donellus [Doneau], who had been

The Roman Law in Holland.

expatriated from France for embracing Protestantism, occupied the chair of Law there. More universities were soon established, and the study of the law advanced. The Dutch universities were so high in reputation that students from Bourges and Toulouse began to be drawn to Leyden and Utrecht; but in course of time political vicissitudes crippled the schools of law, and the lead passed over to Germany. Grotius, Vinnius, Van Leeuwen, and Huber lived in the seventeenth century.

The University of Leyden.

Grotius.

Huig van Groot, or Hugo de Groot, or, in the Latinised form, Hugo Grotius, is a great name in Dutch Biography. He was born at Delft on 10th April, 1583. He was descended from an old and noble family whose members had for more than a century before his death occupied the highest offices in the service of their native city, and distinguished themselves in the defence of her liberties. Grotius early displayed signs of inherited genius. At eleven years of age he entered the University of Leyden, where, in his fifteenth year, he took the degree of Bachelor of Laws, and his Doctor's degree in Civil Law at the age of twenty-one. Shortly after he was admitted an Advocate of the Court of Holland, and of the High Council or Supreme Court, and settled down to practise in The Hague, and in his twenty-third year he became Attorney-General or Fiscal of the Provinces of Holland and Zeeland. He sat also as a member of the States-General, and in 1613 was sent as ambassador to the court of King James I. He supported Barneveldt and the followers of Arminius with his pen and influence in the civil disturbances consequent on the heated religious discussions of the time, and received sentence of imprisonment for life in the fortress of Louvestein. From this, at the expiration of eighteen months, he succeeded in escaping, and sought an asylum in France, where he wrote his great work, *De jure belli et pacis.* After an absence of

twelve years he returned to his native country, but by the influence of his enemies he was condemned to perpetual banishment. He passed the remainder of his life in the diplomatic service of Sweden, and died at Rostock in 1645. Among his other works may be noticed *De antiquitate Reipublicæ Bataviæ*, "Introduction to the Jurisprudence of Holland," and a "History of the Goths." The *Consultations* or the "Opinions" of Grotius are indiscriminately dispersed over the six volumes of the *Hollandsche Consultatien*. These have been collated and translated into English and published with copious annotations. The "Introduction to the Jurisprudence of Holland" was composed by its author during his imprisonment in the castle of Louvestein in the year 1620. Mr. Herbert, in his preface to his translation of this work, speaks of it and the circumstances in which it was written as follows:—"The virtuous Barneveldt had fallen by the hand of the executioner, and his most able friends, Grotius and others, were sentenced to perpetual imprisonment; yet, amidst these sufferings, aggravated by the cruel proscription of his innocent family, deprived of the useful Conference on the Customs of Holland, and of all communication with the learned, and assisted with few works to aid his labours, did the author produce a work of which the most learned men have, even to the present day, expressed unqualified approbation"; and Van der Keessel, who at the close of the eighteenth century published his Theses, as a supplement to Grotius, and in elucidation of the controverted points of law, says that it contains in the smallest space the greatest quantity of matter, digested in a most accurate method, and most clear and explanatory; for, by referring on every occasion to the laws of nature and to civil institutions, it exhibits the admirable harmony and analogy of laws, and presents a model deserving the attention and study of every

Commentaries of Van der Keessel and Schorer.

Professor of Jurisprudence. In many places in the present work prominence has been given to the arrangement and expositions of Grotius. Schorer is among the other chief commentators of his works.

Vinnius.

Vinnius was born in Holland in 1588. He studied at Leyden, and soon became Professor of Law there. His chief works are *Jurisprudentia Contractata*, *Juris Selectæ*, and *Tractatus de Pactis*.

Simon van Leeuwen.

Simon van Leeuwen is considered to hold a higher rank than all the great jurists of Holland except Grotius. He was born at Leyden in 1625 and died in 1682. He was an Advocate and Assistant Registrar of the Supreme Court of Holland, Zeeland, and West Friesland. He wrote and published handbooks on Civil and Criminal Procedure and Notarial Practice. His edition of the *Corpus Juris* is supposed to be the best annotated edition we possess of that compilation, but his greatest and best known works are the *Censura Forensis* in Latin, and the Commentaries on Roman-Dutch Law in Dutch.

The *Censura Forensis*.

The *Censura Forensis*, a work of very high authority [per Sir Robert Collier in *Denyssen v. Mostert*, L. R. 4 P. C. 255], was published in 1662,* and the Commentaries in 1678. The latter enjoyed a very wide circulation in the Netherlands, and after passing through no less than eleven editions, a new and revised edition in two volumes, with notes by Cornelis Wilem Decker, Advocate, was published at Amsterdam in 1788 [see Kotze's Tr., Preface].

Works of Huber.

The *Institutiones Historiæ Civiles* is the chief work of Huber. Voet, Westenberg, Schulting, Noodt Rodenburg, and Bynkershoek flourished in the eighteenth century.

Works of Bynkershoek.

The chief works of Bynkershoek, who was born at Middelburg in Holland, are his *Observationes Juris Romani* and *Questiones Juris Publici*.

Johannes Voet.

Johannes Voetius [Voet] was born at Utrecht. His father, Paul Voet, who died in 1677, was, successively, Professor of

* The edition of the *Censura* by De Haas is considered to be the most complete.

Logic, Metaphysics, and Civil Law at Utrecht. Johannes Voet was Professor of Law at Leyden. His chief work is the Commentary on the Pandects in two volumes. He died in 1714. While at Leyden he wrote his commentary, having eighteen years before compiled a compendium of law in the order of the Pandects. The commentary passed through several editions. The first was published in 1698. The second edition was published at the Hague in 1704, and many additions to the text appearing as *addenda* to the second edition were incorporated in the third, published, also at the Hague, in 1707, and said to have been revised by the author himself. The subsequent editions, published after Voet's death in 1713, were mere reprints of the third [Sampson's Tr., Pref.]. Voet, on whom, for his clearness and logic, the great Merlin has bestowed the title of "The Geometer of Jurisprudence," was undoubtedly one of the greatest authorities upon the general principles of law; indeed, no greater authority could be produced [see Judj. of de Villiers, C.J., in *Kriege v. Trustees, S.A. Bank et al.*, 2 Juta, 132], and in the South African Courts, in cases of conflict of authority among the Civilians, Voet is usually followed [Buc. Rep. 1868, p. 223]. The Commentaries of Voet and the Treatise of Grœnewegen exhibit the difference which exists between the Law of Holland and the Civil law. The small extent to which, according to these works, the latter has been altered is striking proof of the admirable principles on which it was founded and of the value which was attached to it. Dionysius Godefredus van der Keessel, whose name has already been mentioned, was born in 1738, and died on the 7th August, 1816. He was an Advocate of the Supreme Court of Holland and Professor of the Civil and Modern Laws in the University of Leyden. He is said to have been an "excellent jurist of the old style" [V. d. K. Lor. Tr., Pref.], and during

His Commentary on the Pandects.

The Treatise of Grœnewegen.

Van der Keessel.

the fifty years of his labours to have sent forth many eminent pupils. Among these was Johannes van der Linden, whose name is of very high authority in the Dutch ceded colonies of Great Britain. Van der Linden, by his "Institutes of Holland," brought up the ancient law as it is to be found in the works of Grotius, Van Leeuwen, Voet, and Bynkershoek to the period of 1806, when the first edition was issued at Amsterdam. This work was written for the instruction of persons unacquainted with the law and desirous of a general and well-founded idea of law and procedure.

Van der Linden's Institutes.

The above, it is hoped, is a sufficient exposition of the sources of the law explained in these pages. As to the Roman-Dutch Law, it may here be observed that the words of Voet—*Leges etiam suum ævum ac fatum habent**—in the opening chapter of his work, one is tempted to look upon as prophetic of the destiny of that law which he himself enriched in his own inimitable way; for, barely five years after the publication of the valuable work of Van der Linden, the Roman-Dutch Law, embellished as it had been by the learning and research of a body of authors "whose labours are among the evidences of the greatness and glory of the old Netherlands," was superseded in Holland, on the subjugation of that country by France, by the introduction of the *Code Napoleon*. The Dutch ceded colonies, however, never admitted the new Code from the circumstance of their being, during the war which preceded the short peace of Amiens and the treaty of Paris, under the dominion of Great Britain.

Supersession of the Roman-Dutch Law in Holland.

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* Voet 1. 1. 1

PART I.

Law generally.

"JURISPRUDENCE, as treated on in the Pandects," says Voet, "is the knowledge of things divine and human, the science of the just and the unjust, or the art of the good and just: a true and not a simulated philosophy" [Voet 1. 1. 4]; and Van der Linden briefly defines it as that science which teaches us what is just and unjust [V. d. L. 1. 1. 1]. Jurisprudence.

Justice is the constant and perpetual desire to render unto every one his own [Voet 1. 1. 7]; and Justice and Injustice are measured by the agreement or disagreement of any act with the law [V. d. L. 1. 1. 2]. Justice.

A slightly different analysis is adopted by Van Leeuwen. He says [*Cens. For.* 1. 1. 1. 1]—Law is the science of that which is good and equitable, separating the fair from the unfair, and distinguishing that which is allowed from that which is forbidden; Justice is the constant and unceasing willingness to render to each his own; and Jurisprudence is the practice of Law and Justice, and thus includes the learning connected with things human and divine, and the knowledge of the just and the unjust. Van Leeuwen's analysis.

The maxims of law are, *Honeste vivere; neminem lædere; suum cuique tribuere* [*Ibid*]. Maxims of Law.

Laws should extend to all subjects alike, and not to particular individuals only, except that, for the encouragement of industry, literature, or art, benefits may be granted by way of monopoly to certain persons to exercise a particular trade, workmanship, or merchandise with anything invented by them, or to print and publish certain books to the exclusion of others* [Voet 1. 4. 11]. Laws should extend to all alike.

* As to privileges such as these generally see Voet 1. 4.

Law is Natural or Positive, Divine or Human.

Law is either *Natural*, being the dictate of reason,* or *Positive*, deriving its origin from the will of the legislator [Grot. 1. 2. 4]. It is also *Divine* or *Human* [Grot. 1. 2. 8]. Another division of law is based upon its subject-matter and object, having reference either to the rights of the State, when it is called *Public Law*: or to private rights of citizens, when it is called *Private Law* [Grot. 1. 2. 24; *Cens. For.* 1. 1. 1. 21].

Public Law and Private Law.

Private Law teaches the rights of persons to things, and the means for defending or prosecuting the same at law [Grot. 1. 2. 28].

Positive Law is either Law of Nations or Municipal Law.

Human positive law is either the *Law of Nations* [*jus gentium*], which contains those laws or duties which one nation is accustomed to observe towards another, for example, the right of war, concerning treaties, &c.; or *Municipal Law* [*jus civile*], containing the laws which the sovereign legislative power of any State has ordained and published. It is either written or unwritten [Grot. 1. 2. 4, 8, 10, 13; V. d. L. 1. 1. 3; *Cens. For.* 1. 1. 1. 11].

Written and Unwritten Law.

The Civil† [that is Municipal] Law, says Voet, is that which every people has established for itself. From the dictates of the Law of Nature or the rules of the Law of Nations it approves particular portions and adopts them as suitable to itself, and to these it adds others at discretion according as its peculiar circumstances demand [Voet 1. 1. 20].

Whom the laws of a country bind.

The laws of a country bind not only the subjects of its sovereign power, but also visitors and strangers so long as they remain in the territory. When, however, subjects change their domicile, and transfer it to another place, they are bound neither by the laws of their former domicile nor its jurisdiction [Voet 1. 3.

* Natural Law, as defined by Justinian and Ulpian, is that which Nature has taught to all animals [Voet 1. 1. 12].

† When qualification is not added, we understand by Civil Law the Roman Law [*Cens. For.* 1. 1. 1. 12].

11; V. d. K. 26. 30]. Ambassadors and their retinue are regarded as residing beyond the territory to which they are sent as such [Voet 1. 3. 12].

Ambassadors and their retinue.

It may here be noted that in the case of a harsh and oppressive law those entrusted with its administration should be careful not to enforce it in a relentless manner, and where there is reason to suspect that they have been unnecessarily harsh, Courts of Justice should scrutinize their acts carefully, and in the interest of the public hold them responsible for every departure from the strict line of their duty, rather than approve or encourage their conduct [*per* Burnside, C.J., in *Babappu v. De Silva*, 1 S. C. R. 170].

Harsh laws to be enforced with moderation.

In considering the question as to the law applicable to a particular case we must first inquire whether there is any local ordinance,* or regulation, or proclamation having the force of law or any general law of the land respecting it, or any established custom. On failure of

How question as to the law applicable is to be decided.

* Statutes are divided into Statutes Personal, treating of the law, condition, and quality of persons; Statutes Real, treating of the law, condition, and quality of things; and Mixed Statutes, which contain subject-matter and possess characteristics appertaining to each of the two classes just mentioned. Personal Statutes accompany the person everywhere, both within and beyond territorial limits. Thus, when the law is that a person under a certain age is to be regarded a minor and incapable of accepting legal obligation except through the medium of a guardian, those affected thereby carry the incapacity wherever they go, provided they retain their original domicile. Real Statutes have force within but not beyond territorial limits, and do not bind even subjects, if they are brought under it by having movable property there situate. The effect of a Mixed Statute is that in different ways it has the force of each of the two other kinds, Personal and Real; *e.g.*, statutes enacted with regard to successions *ab intestato*, under which movables descend in accordance with the statutes of the domicile, but immovables according to the statutes of the place where they are situate [*Cens. For.* 1. 1. 1. 12].

Statutes and their classification. Personal Statutes accompany person everywhere. Real Statutes have force only within territorial limits.

With regard to the operation of statutes, it may be observed (1) that the laws and customs of every free province and the ordinances of every town must take effect within the jurisdiction of the same, and bind all the subjects or inhabitants; (2) that all persons who may happen to be within such town or province, whether permanently or for a time only, are held to be subjects or inhabitants; (3) that the laws of every magistracy are valid so far as they do not conflict with the laws of another high power [V. L. Kotz. Tr., Vol. I., p. 29. n].

Operation of Statutes.

these, in Holland, the Roman Law, as a model of wisdom and justice, was called in to supply the *casus omissus* [V. d. L. 1. 1. 4]. This rule had force only if the Civil Law had been at one time received on the particular subject-matter [Voet 1. 1. 2]. In Ceylon, too, where the Roman-Dutch Law is silent, recourse may be had to the laws of Rome [Sir R. Otley's Answers to the Commission of 1830, Ans. No. 18; see Vol. I., p. 14]. The use of the laws of neighbouring States in a *casus omissus* is another means which, although not to be entirely rejected, must be resorted to with the greatest caution, and never but in those cases in which we are satisfied that the analogy of the law of the neighbouring State agrees on the point in question with our own [V. d. L. 1. 1. 4; Voet 1. 1. 2]. In some cases the *Canon Law* was restored to, that is, when the matter in question took its origin from that law, as separation *a mensâ et thoro* and the like [V. d. L. 1. 1. 4].

Laws of neighbouring States.

When the Canon Law was resorted to.

Voet on the applicability of laws.

On this subject Voet writes as follows :—In the case of a controversy between two or more persons we must first see whether it has not been settled by the words or by the intention and meaning of the written, municipal or provincial law.* These being wanting, we must have recourse to the unwritten laws, the established customs of the country, to which we must add the ancient *parœmiæ* or proverbs of the nation confirmed by the long use of the people. If the question at issue cannot be settled from these sources, then only are the decisions of the Roman Law and the illustrations of the Canon Law to be admitted. It is to be noted that we cannot have even subsidiary recourse to the Roman Law where it appears that by universal custom any branch of that law has fallen into disuse, as, for example, the law with regard to adoption, slavery, manumission or the like [Voet 1. 1. 2].

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* As to Statute Law, its divisions, and application see Voet 1. 4. Part 2.

Promulgation is required for the validity of a law. An unpromulgated law is not binding, even on those who were aware that it had been prepared, and would shortly be published [Voet 1. 3. 9, 10; Grot. 1. 2. 1; V. d. L. Juta, Tr. 2, n.]. Promulgation of laws.

Privileges or charters granted to particular places as well as particular laws when promulgated at those places for which they are passed constitute the law there [V. d. K. 2]. Privileges and charters to particular places.

A law never received and never observed has no force if a long time has elapsed since its promulgation, and the people have followed an observance of the older law against the disposition of the new law [Voet 1. 3. 41]. Laws that have never been received or observed.

Authentic decisions and interpretations of the law, provided they have been publicly recorded, have the force of law even without promulgation [V. d. K. 3]. Beyond the territory of the legislator, statutes are binding on those who are perpetual subjects [V. d. K. 31]. Decisions and interpretations of law.

A will relating to immovable property, though permitted by the law of the place where the testator had his domicil, has no force in the place where the property is situated, if prohibited there; and succession *ab intestato* to immovable property is regulated not by the law of the testator's domicil, but by the law of the country where the property is situated [V. d. K. 33]. Succession to immovable property how regulated.

Contracts, testaments, and other acts duly executed in accordance with the laws of the place where they were executed are valid in every other place, unless there is an express law to the contrary, or they have been executed elsewhere in fraud of the law of the domicil [V. d. K. 39]. It is, however, not to be inferred from this rule that acts not executed according to the law of the place of their execution are valid nowhere else [V. d. K. 41]. This rule applies also to judicial acts which should be executed with the solemnities required by the law of the place where the proceedings Contracts executed according to law of place of execution.

are carried on. The law, however, which is administered as between the parties is not always the law of the latter place [V. d. K. 40].

Transactions judged according to laws of domicil.

The transactions of persons who have observed the requisites prescribed by the laws of their domicil are judged according to those laws, although the particular laws of the country in which the matter has to be decided prescribe other forms. For example, a will made according to the form used in the domicil is valid everywhere; the community of goods established between married people by the common law continues in force, although they afterwards take up a new domicil in a country where no community exists [V. d. L. 1. 1. 5].

Law governing contracts.

A person's capacity to enter into contracts is governed by the law of his domicil [*lex domicilii*] at the time of the making of the contract. If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid. If he has not such capacity by that law, the contract is invalid [Dic. 543].

A person's capacity to bind himself by an ordinary mercantile contract, however, is, probably, governed by the law of the country where the contract is made [*lex loci contractus*]; and a person's capacity to contract in respect of an immovable [land] is governed by the *lex situs* [*Ibid.*].

The formal validity of a contract is governed by the law of the country where the contract is made [*lex loci contractus*]. Any contract is formally valid which is made in accordance with any form recognized as valid by the law of the country where the contract is made; and no contract is valid which is not made in accordance with such law [Dic. 549]. This rule is, however, subject to the following exceptions—(1) The formal validity of a contract with regard to an immovable would appear to depend upon the *lex situs*. (2) A contract made in one country in accordance with the

law of that country in respect of a movable situate in another country may possibly be invalid, if it does not comply with the special formalities, if any, required by the law of the country where the movable is situate at the time of the making of the contract [*lex situs*]. (3) Possibly, a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the law of the former, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made. (4) In certain cases a bill of exchange may be treated as valid, although it does not comply with the requirements, as to form, of the law of the country where the contract is made [*Ibid.*].

The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the law or laws by which the parties to it intended, or may fairly be presumed to have intended, the contract to be governed; or, in other words, the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves [Dic. 563].

Generally speaking, the validity of the discharge of a contract, otherwise than by bankruptcy, depends upon the law by which the parties intended the contract to be governed. A discharge in accordance with such law is valid [Dic. 575].

The effect of a contract with regard to a movable is governed by the law to which the parties intended to submit themselves; and the effect of a contract with regard to an immovable is, in general, governed by the law of the country where the immovable is situate—*lex situs* [Dic. 586].

The effect of a contract for the carriage of persons or goods from a place in one country to a place in another

is, as to its general incidents, presumably governed by the law of the place where it is made ; but, as to transactions taking place in a particular country, may, in certain cases, be governed by the law of such country [Dic. 594].

New law not applicable to things done anterior to it.

A new law, unless there is express provision in it to the contrary, cannot be applied to things done anterior to its enactment, and in the case of a crime committed before a new law laid down heavier penalties for it, it is the punishment under the old law that has to be meted out [Voet 1. 3. 17].

Promulgation of new law pending appeal.

If after a suit has been decided according to a then existing law, and after an appeal has been entered, a new law repealing the old one happens to be promulgated, while the appeal is pending, the appellate judge is not bound to give judgment according to the new enactment, even where the Legislature has expressly provided that the new law should apply *ex post facto* [Voet 5. 1. 51]. But where an interpretation is put on a hitherto doubtful law, acts committed prior to such interpretation must nevertheless be dealt with in accordance therewith [Voet 1. 3. 17].

Custom.

Well-established customs, also termed unwritten laws, are followed like laws, when they rest upon some reason, and when they have been satisfactorily proved, *e.g.*, by a great number of witnesses or by an unbroken chain of decisions founded upon them. Customs fulfilling these requisites not only supply the place of law in cases in which the written law is silent, but have even the force of annulling a written law* [V. d. L. 1. 1. 7 ; Grot. 1. 2. 21] ; and ancient customs, if they have not been abrogated by subsequent laws, have the force of law, although they may not have been registered among the acts of the Court [V. d. K. 5]. If there is a doubt whether a custom has been

* But see p. 36 *infra*.

introduced according to the usages of those availing themselves of it, it must be proved by him who pleads it, and relies on it [Voet 1. 3. 32]. It was at one time thought that the evidence of two witnesses worthy of belief was sufficient to prove a custom ; but the better opinion seems to be that a "crowd" of witnesses, not fewer than ten, are necessary [Voet 1. 3. 34. But see Cey. Ev. Ord., sects. 13, 48, 134]. At what point, or after what lapse of time, a custom is introduced is defined by no certain law ; but it is left to the finding of the Judge upon the varied facts of cases to determine how many acts and what lapse of time may be necessary. A decided case in its favour is not absolutely necessary, and as to the authority or consent of the sovereign which some jurists think is necessary, it may be observed that such consent or authority may be presumed from the fact of his having allowed or not having forbidden the usages constituting the custom in question [*Cens. For.* I. 1. 1. 14, 15].

How custom is proved.

In England, a custom, to be good, must have existed from the time of legal memory, or the commencement of the reign of Richard I. [1189], except in those cases to which the Prescription Act, 1832 [2 and 3 Will. IV. c. 71] applies [*Mounsey v. Ismay*, 34 L. J. Ex. 52 ; *Bryant v. Foot*, 36 L. J. Q. B. 66 ; 8 C. R. C. 275]. A custom to be good must be limited, certain, and reasonable, and must have had a lawful origin [*Fitch v. Rawling*, 2 H. Bl. 393 ; *Wilson v. Willes*, 7 East 126 ; *Tyson v. Smith*, 9 Ad. and El. 409 ; 8 C. R. C. 305].

English Law as to custom.

In the total absence of any written or unwritten law we ought to have recourse to natural equity [V. d. K. 24].

Recourse to natural equity in absence of law.

Laws are interpreted (1) by the legislator himself. Where rules are passed under the authority of an ordinance, and the ordinance is subsequently amended by special meanings being attached to certain terms and

How laws are interpreted.

expressions used in it, the rules already passed are not, in the absence of special provision to the contrary, to be taken as affected by the new interpretations [*Alexander v. Alwis*, 3 C. L. R. 12]. Laws are also interpreted (2) by usage, and (3) by the opinion of lawyers. This last has not the force of law, but may be adopted if sound rules of construction have been observed. The chief among these rules are—(1) That the true sense and meaning of the words should be followed, and should not be departed from, if the words are clear [V. d. L. 1. 1. 6]. Words must be given their proper signification, unless it is evident that the legislator meant otherwise, or unless that signification would involve an absurdity, an impossibility, or defect, or a meaning not sufficiently suitable for carrying out the thing intended [Voet 1. 3. 20]. The whole law should be examined in order to discover the intention of the legislator, and that interpretation is to be adopted which is more suited to carry out the thing intended and more in accordance with the mind of the legislator. The interpretation should not circumvent the intention of the legislator, so that that may happen which the legislator did not wish should happen, and yet which the law has not expressly forbidden [Voet 1. 3. 20]. (2) The source from which the law is derived should be considered. (3) When the words of the law are doubtful, its intent and object should be considered, all the separate clauses of the law compared with one another, one law construed by the aid of another, and that which the legislator has said in a similar case, or the custom, or the view which equity most strongly urges should be called in aid, and the consequences which would result from a certain construction may also be usefully considered [V. d. L. 1. 1. 6]. Inquiry might also be made as to the law formerly used by the State in like cases. Inveterate use fixes the meaning of a doubtful law, and custom may be taken into account in its interpretation [Voet

Rules of construction.

True meaning of words to be followed.

Source to be considered.

Intention of legislator to be taken into account.

Inveterate use fixing meaning of laws.

1. 3. 19]. (4) The application of a law may be extended to similar cases on the ground of a perfect similarity of principle. This is termed the "extensive interpretation" of the law. (5) In other cases, on the contrary, the interpretation must be restrictive, principally when some matter contrary to the general rules of law has been introduced from some special necessity to meet a particular case, or when it is evident that the reasons which influenced the legislator do not apply to the case in question, though it might otherwise seem to fall within the words of the law [V. d. L. 1. 1. 6]. The interpretation should not render the law useless, applicable to no cases, and, therefore, destitute of all effect; nor should it distort a law introduced in any one's favour into one causing him loss and damage; nor should interpretation be sought from what has been laid down for certain cases only, under a particular law, or a certain necessity, or from what was introduced in error [Voet 1. 3. 20].

Extension of application of law to similar cases.

Where interpretation is to be restricted.

A fixed interpretation attaching to a law is not lightly to be changed [Voet 1. 3. 19].

Fixed interpretation not to be changed.

In Ceylon, Ordinance No. 21 of 1901 defines more precisely the meaning of certain terms, and gives special significations to certain expressions used in ordinances and other written laws; and makes certain provisions relating to the same.

Local legislation as to interpretation of laws.

It provides that any power conferred by any ordinance on the Governor, or on the Governor with the advice and consent of the Executive Council, or on the Governor in Council, or on the Governor in Executive Council, may be exercised from time to time as occasion requires [sect. 4].

How powers conferred on Governor, &c., are to be exercised.

Whenever any written law repealing either in whole or part a former written law is itself repealed, such repeal does not, in the absence of any express provision to that effect, revive the repealed written law, or any right, office, privilege, matter, or thing not

Repeal of a law does not revive laws repealed thereby.

in force or existing when the repealing written law comes into operation [sect. 5, sub-sect. 1].

Repeal has no effect until substituted law comes into operation.

Whenever any written law repeals in whole or part a former written law, and substitutes therefor some new provision, such repeal does not take effect until such substituted provision comes into operation [sect. 5, sub-sect. 2].

Repeal of law does not affect its past operation, &c.

Whenever any written law repeals either in whole or part a former written law, such repeal does not, in the absence of any express provision to that effect, affect (*a*) the past operation of, or anything duly done or suffered under, the repealed written law; (*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law; (*c*) any action, proceeding, or thing pending or not completed when the repealing law comes into operation; but every such action, proceeding, or thing may be carried on and completed as if there has been no such repeal [sect. 5, sub-sect. 3]. These provisions of section 5 apply to written laws made as well before as after the commencement of the Ordinance [sub-sect. 4].

Rules may be made under Ordinance before it comes into operation.

Where by any Ordinance which is not to come into force immediately on the passing thereof, a power is conferred on the Governor, or the Governor with the advice of the Executive Council, or the Governor in Council, or the Governor in Executive Council, or any body or person to make rules, or to issue orders with respect to the application of such Ordinance, or with respect to the establishment of any office or the appointment of any officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the matter to which, or the fees for which, anything is to be done under such Ordinance, the power may be exercised at any time after the passing of such Ordinance; but rules or orders so made or issued shall not take effect until the commencement of such Ordinance [sect. 6].

Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act, or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding may be done or taken on the next day thereafter on which the court or office is open [sect. 7, sub-sect. 1].

When last day of period for doing an act is a holiday.

Where by any written law any act or proceeding is directed or allowed to be done or taken in a court or office on a certain day, then if the court or office is closed on that day, the act or proceeding may be done or taken on the next day thereafter on which the court or office is open [sect. 7, sub-sect. 2].

When place where act is to be done is closed on last day.

Where a limited time not exceeding six days from any date or the happening of any event is appointed or allowed by any written law for the doing of any act, or the taking of any proceeding in a court or office, every intervening Sunday or public holiday is excluded from the computation of such time [sect. 7, sub-sect. 3].

When Sundays and holidays are excluded in reckoning time.

Where by any written law a day is named for the doing or taking of any act or proceeding, not being an act or proceeding to be done or taken in a court or office, or for the happening of any event, and that day falls upon a Sunday or public holiday, such act or proceeding may be done or taken on the first lawful day next succeeding such Sunday or public holiday [sect 7, sub-sect. 4]. These provisions of section 7 apply to written laws made as well before as after the commencement of the Ordinance [sub-sect. 5].

Where day named for act falls on Sunday or holiday.

Where in any written law or document reference is made to any written law which is subsequently repealed, such reference is deemed to be made to the written law by which the repeal is effected, or to the corresponding portion thereof [sect. 10, sub-sect. 1]. This provision applies to written laws and documents

Where in a law reference is made to a law which is subsequently repealed.

made as well before as after the commencement of the Ordinance [sub-sect. 2].

Meaning of "written law."

The expression "written law," in the above provisions, means and includes all ordinances of the Legislative Council of the Island of Ceylon, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants, and process of every kind made or issued by any body or person having authority under any statutory or other enactment to make or issue the same in and for the Island of Ceylon or any part thereof, but it does not include any Imperial statute extending expressly or by necessary implication to the Island of Ceylon, nor any order of the King in Council, royal charter, or royal letters patent [sect. 3, sub-sect. 24].

Where act is an offence under two or more laws.

Where any act or omission constitutes an offence under two or more laws, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of those laws, but is not liable to be punished twice for the same offence [sect. 8. See Maine on the Ind. Pen. Code, 17; Stokes' Com. Vol. I., p. 10; I. L. R. 6 Mad. 249].

Use of words "from" and "to."

Ordinance prescribing duties of chief of office.

Successors of functionaries or corporations.

Application of law to persons executing function of any office.

In all Ordinances the use of the word "from" excludes the first day in a series of days or any period of time, and the use of the word "to" includes the last day in a series of days or any period of time. Where an Ordinance prescribes the duty of the chief or superior of an office, the provision applies also to the deputies or subordinates lawfully executing the duties of such office in place of such chief or superior. The relation of a law to the successors of any functionaries or corporations having perpetual succession may be indicated by expressing its relation to such functionaries or corporations; and the application of a law to every person or number of persons for the time being executing the functions of an office may be indicated by the mention of the official title of the officer executing such functions at the time of the passing of the Ordinance [sect. 9].

Where any Ordinance confers power on any authority to make rules, the following provisions, unless the contrary intention appears, have effect with reference to the making and operation of such rules—(*a*) Any rule may be at any time amended, varied, rescinded, or revoked by the same authority and in the same manner by and in which it was made. (*b*) There may be attached to the breach of any rule such penalty not exceeding fifty rupees as the authority making the rule may think fit, and any such penalty may be recovered in the same manner as a fine imposed by a police court. (*c*) No rule should be inconsistent with the provisions of any enactment. (*d*) All rules should be published in the *Gazette*, and shall have the force of law. (*e*) The production of a copy of the *Gazette* containing any rule or of any copy of any rule purporting to be printed by the Government Printer is *primâ facie* evidence, in all courts and for all purposes whatsoever, of the due making and tenor of such rule [sect. 11]. In this section the expression "rules" includes rules and regulations, regulations and by-laws [sub-sect. 2]. **Operation of rules framed under the authority of Ordinances.**

An act is deemed to be done under any Ordinance or by virtue of powers conferred by any Ordinance, or in pursuance or in execution of the powers of or under the authority of any Ordinance, if it is done under or by virtue of or in pursuance of any rule, order, or by-law or regulation made under any power contained in such Ordinance [sect. 12]. **Act done under rule framed under Ordinance.**

Whenever by any Ordinance any Act of the Imperial Parliament is extended to this Island, suct Act must be read with such formal alterations as to names, localities, courts, offices, persons, moneys, penalties, and otherwise as may be necessary to make the same applicable to the circumstances of this Island [sect. 13]. **Imperial Acts to be read with modifications as to names, &c.**

The rights of the Crown are not in any manner affected by any enactment unless it is therein expressly stated, **Rights of Crown not**

affected by enactment.

or unless it appears by necessary implication, that the Crown is bound thereby [sect. 14].

When laws are to be treated as obsolete.

If the sole and acknowledged reason of a law ceases entirely, the law must be considered as obsolete [Grot. 1. 2. 23]. As to this, Voet says that the proverb—"The reason of the law ceasing, the whole disposition of the law also ceases"—is to be admitted when it is obvious that the whole reason of the law by which the legislator was moved has completely ceased [Voet 1. 3. 43].

Repeal of laws.

Annulment of law by custom.

The usual way by which a law ceases to be of force is its express repeal by the Legislature [V. d. L. 1. 1. 8]. Laws are also changed by tacit consent of all, by desuetude, and, as observed already, they may be annulled by custom [Voet 1. 3. 37]; but these modes of abrogation have place only in democratic States and where the custom is reasonable. Where it is not reasonable or where the State is under monarchical rule, it has not the force of over-ruling laws regularly passed, unless, in the latter case, the tacit consent or connivance of the Legislature is manifest [Voet 1. 3. 37].

Provision in Act that it is not repealable.

A provision in an enactment that the same is non-repealable is inoperative [Voet 1. 3. 37].

PART II.

LAW OF PERSONS.

LAW has persons for its object in relation to their Status, Sex, and Age.

Division of persons in relation to status.

The division of persons in relation to their status may be determined by reference to (1) Birth, (2) Family and Blood relationship, and (3) Mode and Condition of Life [*Cens. For.* 1. 1. 2. 1].

Persons *sui juris* and *alieni juris*.

In reference to Birth, men are either of full legal capacity or are more or less incapacitated by subjection to others [*sui juris vel alieni juris*]. Subjection to the power of others, except that of a father, a guardian, or a curator, is not recognised by our law [*Ibid.*].

Difference in law between those unborn and those already born.

There is in law a substantial distinction between the unborn and those already born. The unborn are regarded as persons in so far as it may tend to their benefit, but not to their disadvantage [Grot. 1. 3. 4]. Children yet unborn are considered as already born, whenever their interests are in question; and they may therefore succeed *ab intestato*, though they may not have been conceived at the time the person whose succession is in question died [V. d. K. 45].

Monstrosities.

Lusus naturæ when to be reckoned as lawful offspring.

At the time of Grotius, those only were considered to be born who had a body capable of containing a reasonable soul. Hence monstrosities were not regarded as persons, and it used to be the custom to smother them immediately at birth [Grot. 1. 3. 5]. A *lusus naturæ*, says Voet, if it has in the main the human form, is to be reckoned among lawful offspring; but monsters and prodigies in which the human form is not easily distinguishable are not to be so reckoned. The destruction of these would appear to have been approved and permitted [Voet 1. 6. 13].

By Family Status and Consanguinity men are united by a fixed agnatic or cognatic relationship.

Cognation and Affinity.

Relationship by blood is *Cognation;* relationship by marriage, *Affinity.*

Cognation or Consanguinity in the wide sense divides further into Cognation in the strict sense, and Agnation.

Cognation in the strict sense.

Cognation in the strict sense exists between persons who are united in a relationship traced through females, who follow the family of the mother, not of the father. The children of two sisters afford an illustration [*Cens. For.* 1. 1. 5. 1].

Agnation.

Agnation exists between persons who are united in a relationship traced through males, who retained both the name and, in the olden time, the distinguishing arms of the father's family. The children of two brothers afford an illustration [*Ibid.*].

Cognation is either Natural or Civil.

Natural cognation.

Natural cognation is a blood relationship which Nature alone recognises, and is reckoned only through females, but is not accepted in law. This, again, is of two kinds—one which the law permits, although it does not approve of it, such as cognation by concubinage; and another, which the law not only does not approve of, but condemns, such as cognation between those born from promiscuous intercourse, and other illegitimate persons [*Cens. For.* 1. 1. 3. 3].

Civil cognation.

Civil cognation is not only known by Nature, but is approved by law.

The legitimate and the illegitimate.

Upon this basis rests the distinction between the Legitimate and the Illegitimate, as to which see Part II., Chap. II., *infra.*

Further, Cognation, whether it be Cognation in the strict sense defined above, or Agnation, is divided under certain *lines.*

A "line" of persons.

A *line* is a definite aggregate of persons belonging to a common Stock, and this Stock is either Direct or Collateral.

The direct line connects parents and children. It divides again into a higher *line* of parents and a lower *line* of children, and is commonly called the Ascending Line or the Descending Line; whence parents viewed in their relation to children are called *ascendants*, and children viewed in relation to parents, *descendants*. Ascendants and descendants.

Parent covers father, mother, grandfather, grandmother, and so on to about the sixth degree, and to all above them is given the common title of *Ancestors*. [*Cens. For*. 1. 1. 5. 3]. "Parent." "Ancestors."

Child covers son, daughter, grandson, granddaughter, and so on to about the sixth degree, and to all below them is given the common title of *Posterity* [*Cens. For*. 1. 1. 5. 4]. "Child." "Posterity."

The Collateral line connects brothers and sisters, and those who are united to each other through the relationship of two brothers or sisters.

A *line* is again divided into *degrees*, which go upwards, sidewards, or downwards. In the calculation of degrees we ascend to the common stock, and from it strike out transversely or collaterally, and make our descent to the individual whose cognation is in question. Thus, in the case of two persons, A and B, who are related to each other as cousins, being sons of two brothers, the common stock would be the grandfather. Rising from A, his father would be in the first degree of relationship, and his grandfather [the common stock] in the second. Striking out transversely, we come to the other son of the common stock, namely, the father of B, who would be in the third degree of relationship to A, and then we come to B himself, who would thus be in the fourth. Degrees of relationship.

Relationship by *Affinity* exists between the husband and the blood relations of his wife, and likewise between the wife and the blood relations of her husband, but not between the blood relations of husband and wife. So that there is no affinity between the Relationship by affinity.

husbands of two sisters or the wives of two brothers; nor between a person and his wife's brother's wife or wife's uncle's wife; nor is there strictly an affinity between man and wife, though from them it arises. [*Cens. For*. 1. 1. 5. 13, 14].

Adoption.

Adoption, in the presence of a Magistrate of persons under the power of their natural father, or *Arrogation* by Sovereign Rescript of those of full legal capacity, though at one time practised, was not latterly in use among the Dutch; but persons who were taken into a family were in the position of those who were provided with sustenance [*alumni*], although they were not under the law as to either children or kinsman [*Cens. For*. 1. 1. 4. 1. See Voet 1. 7].

The adoptive parent might, however, under the Roman-Dutch Law, institute the adopted child his heir, although he was not obliged to do so; but the adopted child, unlike children or blood relations, could not inherit his property *ab intestato* [V. L. 1. 13. 3].

Slavery.

It may here be mentioned that the difference between freemen and slaves which occupied so large a part of the Roman Law did not exist in Holland, where all men were born free. Slavery was not in use there, and even the slaves who went there from the Indies became free *ipso facto* by their landing, provided they were not runaways or fugitives [V. d. L. 1. 2. 3]. Ordinance No. 20 of 1844 provided for the total abolition of slavery in Ceylon.

Classification of persons in respect of their mode of life and condition.

In respect of their Mode of Life and Condition, men are Ecclesiastics or Laymen, Citizens or Foreigners, and, formerly, Patricians or Plebeians, and Freemen and Slaves. Of these, we need notice only the second class. As to those comprised in it see Part II., Chap. 5. *infra*.

Law of persons in relation to sex and age.

So much for Status. We have said that Law had persons for its object in relation to their Sex and Age also.

Persons already born are either men or women. Hermaphrodites are classed with one sex or the other according as the one or the other predominates in them [Grot. 1. 3. 6 ; Voet 1. 5. 1].

Disabilities of women.

Women cannot be Magistrates nor fill public or other civil offices [Voet 1. 5. 1]. They are, in fact, excluded from holding any office or dignity relating to the Government of a people and its affairs [V. L. 1. 6. 3].

Considerations of sex and age give rise to legal relations involved in marriage and minority and majority. These will be dealt with at their proper places.

"Civil Status"

The rights, qualities, and capacities of persons resulting from the states and conditions noticed above may be conveniently grouped and treated under the head of "Civil Status :" that is to say, the status of persons, as members of civilised communities, recognised and regulated by the laws of such communities. This status may be dealt with as it is influenced, respectively, by considerations of (1) Birth, (2) Age and mental or corporeal incapacity, (3) Marriage, (4) Residence and (5) Citizenship.

CHAPTER I.

Birth in relation to Civil Status.

Legitimate children.

By birth children are either legitimate or illegitimate. Legitimate children are born of married parents. To further marriage, the rule has been established that that child be considered legitimate who is born of a married woman, and that he be the father whom the marriage indicates [*Cens. For*. 1. 1. 3. 5].

Presumption of legitimacy.

All children born of a married woman are presumed to be legitimate, for the husband of the woman is presumed to be their father, unless there be evidence of his impotence or of absence inconsistent with the period of pregnancy, which is limited to a minimum of seven and a maximum of eleven months [Grot. 1. 12. 3]. So strict is this rule that even if a woman be proved an adulteress, still her offspring in a case of doubt must be considered as conceived rather from her husband than her adulterer. So that, if a woman declare that she is with child by another than her husband, the declaration harms neither him nor the offspring, if no other proof be forthcoming [Menoch. lib. 2 Arbitr. Jud. Cas. 89. n. 20 *et seq.*].

Legitimacy of child where marriage had been dissolved.

Where a marriage has been dissolved, a child, in order to be deemed legitimate, should be born within ten months, that is, three hundred days after the dissolution [V. d. K. 170].

Exceptions to rule that child born after marriage is offspring of the marriage.

Four exceptions, recognised by the law of Holland, were admitted by the Civil Law to the rule that a child born after the marriage of its mother is the offspring of such marriage:—(1) The absolute and permanent impotence of the husband. (2) The accidental impotence or bodily disability of the husband. (3) His absence

from his wife during that period of time in which, to have been the father of the child, he must have had sexual intercourse with her. (4) His abstention from intercourse with his wife for some time in consequence of infirmity or some other cause. It has been considered that these exceptions admitted proof not only of a physical impossibility, but also of those circumstances which constitute what has been termed a moral impossibility that the husband was the father of the child [1 B. 60]. The time which intervenes between the marriage of the parents and the birth of the child may be so short as to render it certain that it must have been the fruit of a cohabitation which preceded the marriage; but the presumption of illegitimacy arising from the birth so recently following the marriage might be repelled by proof that there had been intercourse or the means of sexual intercourse between the husband and the wife previous to their marriage [1 B. 61]. The physical impossibility arising from the absence of the husband exists when the birth of a child takes place at a period so distant from the commencement of that absence, or so recently after it has ceased, that it cannot according to the course of nature be attributed to his sexual intercourse with his wife [1 B. 63]. The absence must be uninterrupted. The distance which separates him from his wife should be such as not to raise, by the opportunities afforded of visiting her, a presumption that he availed himself of those opportunities. The physical impossibility does not exist if it was in the power of the husband to have access to her, because, if he had the power, the law presumes he used it [*Ibid.*]. It would be impossible to define what is the distance which should exclude the presumption that the husband had visited his wife, but it must be decided by the circumstances connected with his station in life, and the employment or duties in which he is engaged. But if the proof of absence

Physical impossibility of access.

leave a doubt in the judicial mind whether there may not have been access, the presumption of legitimacy will remain, and the rule *pater est quem nuptiæ demonstrant* prevail [1 B. 65]. The length of the intercourse which has elapsed since the commencement of the husband's absence or since the dissolution of the marriage, or the shortness of that which has elapsed since his absence ceased, may constitute the physical impossibility of access; and it, therefore, becomes necessary to ascertain the extreme period of utero-gestation [*Ibid.*].

Moral impossibility of access.

So much for physical impossibility of access. Legitimacy is also repelled by those circumstances in the conduct of the wife and husband which constitute what is termed the moral impossibility of an access to which the birth of the child can be referred [1 B. 72]. Thus, the presumption of legitimacy may be repelled by proof of all those circumstances which could enable a judicial tribunal to decide whether the husband was, in fact, the father of the child [1 B. 76]. Mutual aversion, for instance, so inveterate and violent as to constitute a moral disease, has been taken into account in deciding this question [1 B. 73].

The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question that no sexual intercourse did take place between the husband and the wife at any time when by such intercourse the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is whether the husband was the father of such child, and the evidence to prove that he was not the

father must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury that no sexual intercourse took place between the husband and wife at any time when by such intercourse the husband by the laws of nature could be the father of such child [1 B. 76].

Lord Redesdale's dictum in the Banbury Peerage case.

The above is, of course, the English law on the subject of the presumption as to paternity in the case of a child born to a married woman. That law may be summarised in the words of Lord Redesdale in the case well known as the Banbury Peerage case [1 Sim. & S. 153. See *Morris v. Davies*, 5 Cl. & Fin. 248]—"The presumption of the birth of a child in wedlock may be rebutted both by direct and presumptive evidence; first by direct, as impotency and non-access, that is impossibility of access; secondly by all those circumstances which may have the effect of raising a presumption that the child is not the issue of the husband." Our law on the subject is contained in section 112 of the Evidence Ordinance, which is as follows—"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten, or that he was impotent." And Bonser, C.J., in the case of *Perera v. Podi Singho* [5 N. L. R. 243], in which he questions the soundness of the decision in *Pavistina v. Aron* [3 N. L. R. 13], and overrules a large part of the decision in *Podina v. Sada* [4 N. L. R. 109], accepts Lord Redesdale's definition of "non-access," namely, impossibility of access, and holds that inasmuch as our ordinance does not go on to say that the second class of evidence spoken of by Lord

Law of Ceylon on the subject.

Redesdale is admissible, namely, evidence to show what may be called a moral impossibility of access, it is necessary under our law to prove that access was physically impossible so as to displace the presumption in favour of the father of a wife's offspring being her husband. But it is possible that, in the passage cited above, Lord Redesdale did not intend to give a definition of "non-access" that should be universally applicable, but that he meant that, in view of the second class of evidence spoken of by him, the expression "non-access" in the proposition he laid down must be given the particular meaning he attributed to it therein. The words used in the section of the Evidence Ordinance cited above do not by themselves necessarily imply impossibility of access; and it is noteworthy that the section of the Indian Evidence Act under the same number is substantially the same as that of the Ceylon Evidence Ordinance cited above, and in the "Commentary on the Law of Evidence applicable to British India," by Ameer Ali and Woodroffe, the authors in their observations on the section referred to, in the course of which they cite numerous decisions of the English Courts, say that, in the rule, "access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse, and that non-access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact [p. 670]. The Supreme Court has, however, in a recent case, followed the opinion of Bonser, C.J., in the case of *Perera v. Podi Singho.*

Indian Evidence Act.

In an old case, long anterior to the passing of the Evidence Ordinance, the Supreme Court held that where the husband and wife had cohabited together, and no impotency was proved, the issue was conclusively presumed to be legitimate, though the wife was shown to have been at the same time guilty of infidelity. And even where the parents were living

separate, a presumption of legitimacy arose so strong that it could only be rebutted either by proof of previous divorce or by cogent and almost irresistible proof of non-access in a sexual sense. Nor was the fact that the woman was living in notorious adultery in itself sufficient to repel this presumption [Ram. 60–62, 90].

Marriage and birth may be established by proof of cohabitation, &c.

As a marriage may be established by proof of cohabitation, acknowledgment, and reception by the family, so may birth be established by the same species of proof [1 B. 84].

Judgment as to status of legitimacy.

The Civil Law afforded the means of obtaining a judgment on the status of legitimacy; and for that purpose an action might be brought by the wife against the husband, or by the father against the son, or by the son against the father, in which the abstract question of filiation or paternity or legitimacy was tried and decided. Actions of the same nature and having the same object were allowed in those countries which adopted the Civil Law [1 B. 90. See *Cens. For.* 2. 1. 20. 15].

Legitimacy by birth.

To make offspring legitimate by birth it is sufficient if during the period of pregnancy lawful marriage took place, so that the very moment after the marriage of the parents is complete a legitimate child may be born; but if the husband denies on oath having had connection with his wife before marriage, his oath is to be accepted [*Cens. For.* 1. 1. 3. 5]. In any event, children are considered legitimate who are born in the seventh month or after the 182nd day reckoned from the celebration of the marriage; and the offspring of a woman of good character and unquestioned chastity is considered legitimate, though born in the eleventh month of the husband's absence, and is its father's heir [*Ibid.*].

Children born of connection between those betrothed.

When a man has had connection with his betrothed, and dies before the marriage has been consummated by the bonds of the church or other legal form, the

question arises whether the child born of the connection is to be considered legitimate, and as such to be allowed succession to the father and his kinsmen. There are some among the older writers who answer this question in the affirmative, but the weight of authority and even express legislation in Holland are in favour of a negative answer [*Cens. For.* 1. 1. 3. 6; Voet 1. 6. 10]. If, however, it is clear that the parties wished to contract marriage, and that the Municipal laws do not invalidate marriages not contracted with the forms prescribed by law, then the better opinion would seem to be that the offspring are lawful [Voet 1. 6. 10].

Second marriage, former spouse being supposed to be dead.

In the case of a second marriage contracted in good faith by both parties, the former spouse being supposed to be dead, the children born thereof are legitimate [V. d. K. 64], and even if the second spouse alone has acted *bonâ fide*, having been deceived by the bigamist, a son born of such union will also be legitimate [V. d. K. 65]. A marriage consummated with religious or other legal formalities is valid although no intercourse follows [*Cens. For.* 1. 1. 3. 6].

Marriage is complete after solemnization.

Offspring of concubines.

In the olden time a distinction was observed between those who are born of a woman [commonly, a concubine] with whom marriage was not forbidden, and with whom the father and he alone had connection which was neither adulterous nor incestuous; and those who are the offspring of a common prostitute. The former were called natural children, and the latter *Spurii* [*Cens. For.* 1. 1. 3. 8]. This distinction has disappeared, and natural children and *Spurii* are now indiscrimately placed under the former designation, a concubine being allowed no privilege above other abandoned women [*Cens. For.* 1. 1. 3. 9; Grot. 1. 12. 5].

Natural children and *Spurii*.

Natural children and children born *ex prohibitu concubitu*.

Illegitimate children may, therefore, be considered under the two general heads of natural children and children born *ex prohibitu concubitu* [Grot. 1. 12. 4].

Children *ex prohibitu concubitu* are children begotten in adultery or of two persons related to each other within the prohibited degrees of consanguinity or affinity [Grot. 1. 12. 6].

Natural children succeed to mother.

The main difference in law between the legitimate and the illegitimate relates to hereditary succession. Natural children are admitted to succeed to their mother, but they have no right to succeed to their father or kinsmen on the father's side. They may take under the will of the father [2 N. L. R. 276].

Offspring of criminal union.

The offspring of a criminal union, however, namely, those born in incest or adultery, succeed neither to father nor mother, nor to the kinsmen or relatives of these, nor take under their wills, but they have a right to what is necessary for their maintenance [*Cens. For.* 1. 1. 3. 10; 2 N. L. R. 276; 3 C. L. R. 93].

Do illegitimate children inherit from mother's relations?

As to the question whether illegitimate children are admissible to the inheritance *ab intestato* of their mother's relations, there is difference of opinion. Van der Linden is inclined to agree with those who answer the question in the negative [V. d. L. 1. 10. 3]. That is now the law in Ceylon [see Ord. 15 of 1876, s. 37].

Father could not leave anything to incestuous, &c., offspring.

The father could not leave anything to incestuous or infamous offspring either by last will or by an act *inter vivos*, or through the interposition of a third party [Holl. Cons. 1. 2; Cey. L. Rev., vol. I., p. 9]. Whatever was so left passed to the Treasury, but in later years was allowed to be taken by the co-heirs [V. d. K. 70].

Succession to bastards.

Bastards who leave children born in lawful wedlock may be succeeded by these as heirs *ab intestato*, and on failure of children the goods go to the next of kin on the mother's side, so as to exclude the Crown [V. d. L. 1. 10. 3].

Succession to illegitimate children.

Under Ordinance No. 15 of 1876 [sect. 37] illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother. Where an illegitimate person leaves no surviving spouse or descendants, his or

her property will go to the heirs of the mother, so as to exclude the Crown.

A bastard died intestate before the passing of the Ordinance leaving him surviving his mother and a brother and sister. The Crown waived all claim to the property left by the intestate; and it was held that, in the circumstances, whether the devolution was governed by the North or the South Holland Law of inheritance, the mother must be held entitled to such property to the exclusion of the illegitimate brother and sister [*Sinno Appu v. Abeywickreme*, 4 N. L. R. 242].

Father of illegitimate child civilly liable to maintain it.

The father of an illegitimate child is civilly liable to maintain it. The liability extends even to the father's heirs; and its mother may compel the performance of this duty by a civil action [*per* Bonser, C.J., in *Subaliya v. Kannangara*, 1 Tamb. 2; Voet 25. 3. 5; *Cens. For.* 1. 1. 10. 1].

Legitimation of illegitimate children.

Illegitimate children can be legitimated in only two ways: by marriage, that is, when the parents are lawfully married, after the birth of the children, in which case the children are in all respects regarded as though legitimate by birth; or by an act of grace on the part of the State [Grot. 1. 12. 6]. A child born after marriage, though it be the result of previous secret intercourse of the parents, is to be reckoned among lawful children, even if after the marriage there has been no further intercourse, and even if the parents reside at a place where, in order to secure the other consequences of marriage, admission to the nuptial couch is necessary in addition to the sacerdotal or other public ceremony [Voet 1. 6. 5].

In Ceylon a legal marriage between any parties has the effect of rendering legitimate the birth of any children who may have been procreated between the same parties before the marriage, unless such children have been procreated in adultery [Ord. No. 2 of 1895, sect. 22].

It may here be mentioned that the status of legitimacy as depending upon *legitimatio per subsequens matrimonium* is determined by the law of the country of the domicile of the father. But the character of heir to English land is determined by the law of England [*Lauderdale Peerage Case*, 10 App. Cas. 692; *Birtwhistle v. Vardill*, 7 Cl. & Fin. 933; 5 C. R. C. 747]. Law determining status of legitimacy.

This mode of legitimation places the children in the same situation as to relationship, family, and succession as if they had been legitimate by birth, *omnia vitia præterita tollit.* It has relation to the time of their birth, so that they are deemed to have been born legitimate [1 B. 94].

In order that the intermarriage of the parents may render the child legitimate, it is essential that there should have been no impediment to their marriage at the time of its birth. The offspring of an adulterous intercourse cannot therefore be rendered legitimate [1 B. 95; *Cens. For.* 1. 1. 3. 15]. The intermediate marriage of either of the parents with another person after the birth of their child will not prevent their own subsequent intermarriage with each other from conferring legitimacy on that child [1 B. 97; Voet 25. 7. 11]; and legitimacy conferred on a child by the subsequent marriage in no respect differs from that which he would have derived from his birth. He becomes heir to both his ancestors as well in the direct as in the collateral line. He will take under the description of children born in lawful wedlock [1 B. 97].

The grandson has the benefit of a legitimacy of his father by the subsequent marriage of his grandfather and grandmother, notwithstanding the father may be at that time dead [Voet 25. 7. 7; 1 B. 98]. Legitimacy of father by subsequent marriage of grandfather and grandmother.

This mode of legitimation is not admitted by the law of England nor that by favour of the Sovereign.

The effect of the marriage in rendering children legitimate does not depend on the law of the country

in which it takes place, but on some other law which has conferred on them a pre-existing status or capacity to become legitimated by the marriage. They may be rendered legitimate notwithstanding the law of the country in which the parents married rejects legitimation *per subsequens matrimonium;* and on the other hand, notwithstanding it admits that institution, they may retain their illegitimacy [1 B. 102].

Effect of change of domicile of origin on questions of legitimacy, &c.

It is thought by some that the qualities which a personal universal law has once conferred on a person accompany him to all places, and are not affected by any change of his domicil. Thus, not only the status of legitimacy or illegitimacy and the capacity or incapacity to be legitimated *per subsequens matrimonium* depend on the law of the domicil of origin, but the period of majority is also determined by that law. The majority of writers however consider that when the domicil of origin has been changed, the law of that domicil no longer prevails, but yields to that of the new domicil [1 B. 103]. The doctrine, however, does not, it is agreed, extend to the status of legitimacy. That still remains to be determined by the law of the domicil of origin, notwithstanding there may have been another domicil acquired by the persons or by their offspring before their marriage [1 B. 104; see Voet 4. 1. 29]. Although the law of the domicil confers the status of legitimacy or the capacity to be legitimated *per subsequens matrimonium*, and such status is recognised in every country which admits this institution, yet its effects and the exercise of the rights incident to it are controlled, if a law respecting it prevails in a country where the property is situated which is the subject of a claim founded on legitimacy. Legitimation *per subsequens matrimonium* is equally restricted in its operation in respect of property, situated in a country which does not admit this institution. The personal quality or status of the

person, if it constitute his title to succeed to real property, must be that which the *lex loci rei sitæ* has provided. It is one of those subjects on which that law exclusively decides [1 B. 109].

As the *situs* of personal property is that of the domicil of the owner, the succession to it *ab intestato* is governed by the law which prevails there. If it exclude those who are not born in lawful wedlock, those who are only legitimated by the subsequent marriage of their parents are not admissible to the succession. Thus, the law which has conferred on them the legitimacy must yield to that which governs the succession; and the law of the domicil of the deceased will defeat the claim to the personal estate as effectually as the existence of a similar law *in loci rei sitæ* would defeat the claim to real estate.

Summary of law as to legitimacy and capacity to become legitimate *per subsequens matrimonium*.

Burge sums up the position thus:—The status of legitimacy or illegitimacy or the capacity to become legitimate *per subsequens matrimonium* is governed by the law of the domicil of origin; but although the status of legitimacy may have been conferred, yet if it be not that legitimacy which the *lex loci rei sitæ* or *lex loci domicilii* requires in those whom it admits to the succession, it will not entitle the person to the succession. Thus, the law of the domicil of origin will yield to that of the *situs* of real property or to that of the domicil of the deceased, according to the nature of the property which is the subject of litigation [1 B. 111].

Child born only a short time after second marriage of wife.

In the case of a child given birth to by a woman married a second time so soon after the death of her first husband that it may possibly be a posthumous child of her first husband or a child of her second, the better opinion is that it is to be regarded as born to the second husband [Voet 1. 6. 9].

Legitimation by favour of Sovereign.

As to legitimation by special favour of the Sovereign, this is granted chiefly in cases where by the death of one of the parties the legitimation by subsequent

marriage has become impossible. It is, however, subject to this condition, that the children are not born in incest or adultery. To these legitimation is very rarely and only for very weighty reasons granted [V. d. L. 1. 4. 2; Grot. 1. 12. 6]. It is more readily granted to natural children especially at the father's request [Grot. 1. 12. 6].

Legitimation by act of the Sovereign power does not affect any relations other than those who have consented to it [*Ibid.*].

Limited nature of legitimation by act of Sovereign.

The effect of legitimation by letters of the Sovereign is of a much more limited nature than that produced by marriage. The children cannot share in the succession with legitimate children born before it was obtained, although they will share with those born after it was obtained [1 B. 99]. According to the law of Holland, if the natural child was desirous of succeeding to the *agnates* on the father's side, he must prove their previous or subsequent consent to his legitimation. So, the *agnates* who would succeed to the natural child must show that they had consented to his legitimation [1 B. 100].

Rights acquired by third persons not to be affected.

Legitimation by rescript from the Sovereign neither deprives a third person of the property which, in consequence of the illegitimacy of the children, has already been acquired by him or is to devolve on him under a *fidei commissum*, nor confers on the children so legitimised the right of succession to the property of those paternal relatives who have neither expressly nor tacitly consented to the legitimation, except as regards persons born after such legitimation upon a new marriage, to whom the legitimised children may succeed [V. d. K. 172].

On whom the favour may be conferred. Its effect on real property in foreign country.

The persons on whom the Sovereign can confer this legitimation must be his subjects. It has no effect in respect of real property situated in any country not under his dominion [Voet 25. 7. 16; 1 B. 100].

For the more correct ascertainment of facts as to the age, paternity, &c., of children, Ordinance No. 1 of 1895 as amended by Ordinance No. 23 of 1900 makes provision for the registration of births.

Registration of births and deaths.

The father or mother of every child born in Ceylon, or in case of the death, illness, absence, or inability of the father and mother, the occupier or an inmate of the house in which the child is born should, within forty-two days next after its birth, give information to the registrar of the division, according to the best of his or her knowledge and belief, of the several particulars required by the Ordinance to be known and registered touching the birth and name of the child, and in the presence of the registrar sign the register [sect. 12].

Father or mother to give information.

The particulars required by the Ordinance are the sex of the child, the name (if any) given to it, when and where it was born, the name, surname, rank or profession and nationality of the father, the name, maiden name, and nationality of the mother, whether the parents are married, and the name and residence of the informant, and in what capacity he gives information [see Sch. II.].

Particulars to be registered.

If the person referred to above cannot conveniently attend the office of the Registrar, he may send a declaration in the form C in the second schedule to the Ordinance, giving his own name, description and place of abode, and the particulars required to be registered. Such declaration should bear a stamp of twenty-five cents. The Registrar should then certify the particulars in the register and sign the register, and preserve the declaration forwarded to him. The Provincial Registrar or Assistant Provincial Registrar may, however, by notice in writing, require the declarant to attend at the office or station of the Registrar within seven days of the receipt of the notice, and to supply such other information as may be required by him [sect. 12].

When informant cannot attend Registrar's office.

When new-born child is found exposed.

When a living new-born child is found exposed, the person finding the child and any person in whose charge such child is placed are bound to give, to the best of his knowledge and belief, to the Registrar of the division, within seven days after the finding, such information of the particulars required to be registered concerning the birth of such child as the informant possesses, and in the presence of the Registrar sign the register [sect. 13].

Where birth has not been registered in time.

Where a birth has, from the default of the persons required to give information, not been duly registered, the Registrar of the division may at any time at the end of forty-two days from such birth, or, in case of a living new-born child found exposed, at the end of seven days after the finding of such child, require, by notice in writing, any person required by the Ordinance to give information concerning such birth to attend personally at the Registrar's office within such time, not less than seven days after the receipt of such notice nor more than three months from the date of the birth or of the finding of the living new-born child, as may be specified in such notice, and to give information to the best of such person's knowledge and belief of the particulars required to be registered concerning such birth, and to sign the register in the presence of the Registrar; and such person is bound, unless the birth is registered before the expiration of the time specified in such requisition, to comply with the requisition [sect. 14].

Registration to be without fee.

Upon information being duly given to the Registrar he is bound to register the birth without fee or reward from the informant, and to sign the register [sect. 15].

Birth on an estate.

Where the birth has happened on an estate [meaning any land having ten acres or more in cultivation, and situated in a district appointed under the Medical Wants Ordinance, No. 17 of 1880] information as aforesaid should be given within twenty-four hours to the

superintendent of the estate, and not to the Registrar. The superintendent should verify the information and, within forty-eight hours of the birth, report it in form D in the second schedule to the Ordinance to the medical officer appointed under "The Medical Wants Ordinance, 1880." Such officer should transmit the report without delay to the Assistant Provincial Registrar, or, if there be no such assistant, to the Provincial Registrar within whose local jurisdiction the estate is situated, and the Provincial Registrar or Assistant Provincial Registrar should thereupon register the birth in the prescribed form and manner [sect. 16].

Person required to give information leaving the division.

Any person required by the Ordinance to give information concerning a birth, who before such birth is registered leaves the division in which the birth has taken place, may within three months after the birth give the information by making and signing, in the presence of the Registrar of the division in which he resides, a declaration in writing of the particulars required to be registered ; and such Registrar on payment of a fee of fifty cents should receive and attest the declaration, and send the same to the Registrar of the division in which the birth took place [sect. 17].

Illegitimate children.

In the case of an illegitimate child no person, as its father, is required to give information under the Ordinance concerning its birth. The Registrar should not enter in the register the name of any person as father of such child, except (*a*) at the joint request of the mother and the person acknowledging himself to be the father or upon an order from a competent Court. In the former case, the person acknowledging himself to be the father should sign the register together with the mother ; and in the latter case, a summary of the order of the Court should be recorded in the register [sect. 18].

Registrar may call for

If the Registrar doubts the legitimacy of any child whose birth is sought to be registered, or suspects fraud

certificate of marriage.

on the part of any informant, he may call for a certificate of the registry of the marriage of the alleged parents of the child or for such other proof, as the law may prescribe, of the marriage. If satisfactory proof is not produced, he should enter in the column set apart for that purpose that such certificate or proof was not produced [sect. 19].

Further provisions.

The Ordinance further makes provision for the registration of births after the expiration of three months [see sect. 6 of Ord. No. 23 of 1900], for the alteration of a name once registered [sect. 7], and for the rectification at the instance of any party aggrieved of any entry in a register [sect. 22].

Registration of deaths.

Who should give information.

The Ordinance, it may here be noted, provides for the registration of deaths also. When a person dies in a house, it is the duty of the nearest relatives present at the death or in attendance during the last illness of the deceased, and in default of such relatives of every other relative of the deceased, and in default of such relatives of each person present at the death and of the occupier of the house in which, to his knowledge, the death took place, and in default of the persons mentioned above of each inmate of such house and of the person causing the body to be buried, to give, to the best of his knowledge and belief, to the Registrar of the division, within the five days next following the day of such death, information of the particulars required to be registered concerning such death, and in the presence of the Registrar to sign the register [sect. 24].

Where death occurs in place not a house.

When a death occurs in a place which is not a house, or a dead body is found elsewhere than a house, it is the duty of every relative of the decased person having knowledge of any of the particulars required to be registered concerning the death, and in default of such relative of every person present at the death, and of any person finding or taking charge of the body and

of the person causing the body to be buried, to give to the Registrar, within five days next after the death or the finding, such information as aforesaid, and in the presence of the Registrar to sign the register [sect. 24]. The particulars required by the Ordinance are the name of the deceased, when and where the death took place, the sex and nationality of the deceased, his or her age, rank, or profession, the names of his or her parents, the cause of death and place of burial, the name and residence of the informant, and in what capacity he gives information [see form B, Sch. II.].

Particulars of registration.

If any person required to give information cannot conveniently attend the office of the Registrar, he may send a declaration bearing a stamp of twenty-five cents in the form H in the second schedule to the Ordinance, giving his name, description, place of abode, and the particulars required to be registered. The Registrar may, however, require by notice in writing the declarant to attend within seven days of receiving such notice at the Registrar's office or station, and to supply such other information as may be required by the Provincial Registrar or Assistant Provincial Registrar [sect. 24].

Where informant cannot attend Registrar's office.

In the case of the death of any person who has been attended during his last illness by a medical practitioner, that practitioner should sign and give to some person required by this Ordinance to give information concerning the death, a certificate in the form I in the second schedule to the Ordinance, stating to the best of his knowledge and belief the cause of the death; and such person, upon giving information concerning the death, should deliver the certificate to the Registrar, and the cause of death as stated in the certificate should be entered in the register together with the name of the certifying medical practitioner [sect. 25].

Where medical practitioner has attended during last illness.

The Registrar should register deaths without fee or reward from the informant, and sign the register [sect. 27].

Registration to be without fee.

Further provisions.

The Ordinance further provides for the registration of deaths on estates or plantations, for registration after the prescribed time, for obtaining certificates from the Registrar prior to burial in certain proclaimed places, for registration of still-births in such places, for the correction of errors in the register, for the giving of information of births and deaths by headmen, and for such other purposes.

Extracts from register.

Every person, on making a written application to the Registrar-General, Provincial Registrar, Assistant Provincial Registrar, or Registrar, and under such conditions as may be prescribed by the Governor in Executive Council, is entitled to refer to any book or document kept under the Ordinance ; and on a written application and on payment of such fees as have been prescribed by the Governor in Executive Council, to demand a certified copy or extract of or from every entry in such book or document. The application should bear stamps of the value of twenty-five cents, when it states the year in which the entry sought for was made, and stamps to the value of two rupees and fifty cents, where the year is not stated. The certified copy or extract must also bear a stamp of seventy-five cents to be supplied by the applicant [sect. 41].

Primâ facie evidence of birth, &c.

Such copy or extract, if purporting to be made under the hand of the Registrar-General, or his Assistant, or of the Provincial Registrar, or the Assistant Provincial Registrar, or if purporting to be made under the hand of a Registrar and countersigned by the Registrar-General, Provincial Registrar, or Assistant Provincial Registrar, is *primâ facie* evidence of the birth or death or still-birth to which it refers without any further or other proof of such entry, provided that such entry purports to have been duly made under the provisions of this Ordinance [sect. 42].

Is certificate evidence of date of birth?

The entry in the register under the corresponding section of the older Ordinance [No. 7 of 1867] was held

by the Supreme Court in two cases to be evidence of the fact of the birth having taken place before the date of registration, but not of the exact date of birth [*Silva v. Weinman*, 3 S. C. R. 82 ; *Letchiman v. Perera*, 4 S. C. C. 80].

But later, in the case of *Muttiah v. de Silva* [1 N. L. R. 358], Bonser, C.J., was strongly of opinion that the certificate of birth was *primâ facie* evidence not only of the birth, but also of the date of birth.

CHAPTER II.

AGE [AND MENTAL OR CORPOREAL INCAPACITY] IN RELATION TO CIVIL STATUS.

WE have already observed that persons are either of full legal capacity or are more or less incapacitated by subjection to others [*sui juris vel alieni juris*]. The latter are chiefly minors and those who suffer from some mental or corporeal infirmity. The age of majority under the Roman-Dutch Law for males and females was twenty-five years [V. d. L. 1. 5. 1]. In Ceylon, it was provided by Ordinance No. 7 of 1865 that all persons when they should attain or who, at the passing of the Ordinance, had already attained the full age of twenty-one years should be deemed to have attained the legal age of majority, and that no person should be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding, except that nothing in the Ordinance contained was to be construed to prevent any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law.

Age of majority.

One who is a minor or major according to the law of his domicil is to be considered so all over the world, even in those places where a riper age is needed or lesser years are sufficient for majority, and he who is declared a prodigal or legitimate by the proper Court of his domicil is considered so everywhere [Voet 1. 4—Part 2—7].

Minority to be decided by law of domicile.

Under the Roman-Dutch Law persons of full age were either *majores* or *senectutes* [aged persons]. At what period old age commenced was not certain, and it was left to the discretion of the Judge to fix it, except in such matters and circumstances where the law had

Majores and *senectutes*.

itself determined it, as in cases of guardianship and other onerous public duties: for instance, naval and military expeditions, mounting guard by night, and the like. From these a man of the age of seventy years was upon his request excused. So, likewise, a person of the age of seventy might excuse himself from all offices relating to the Government of the country at large, or of a city. In public matters, however, old age, so long as no apparent incapacity intervened, was esteemed as wise in counsel, and was preferred to youth [V. L. 1. 12. 2]. With us, males of the age of fifty-five years are exempt from liability to perform services for the maintenance of public thoroughfares [Ord. No. 10 of 1861, sect. 49].

Age at which males are exempted from services to maintain thoroughfares.

All obligations incurred by minors are invalid except through delict or in so far as they have been benefited [Grot. 3. 1. 26]. They can neither alienate nor mortgage their own property [Grot. 2. 48. 4]. The opinion entertained by Voet and Groenewegen, viz., that children who have attained the age of puberty may be civilly liable on their own contracts, and be sued after they have attained majority, or after the death of the parent is, says Van der Keesel, wholly opposed to the analogy of the Dutch Law [V. d. K. 474].

Contracts by minors.

In Ceylon, it was at one time thought that contracts by a minor to his prejudice were merely voidable and not void, and hence a conveyance by a minor of his property was held to be merely voidable, liable to be avoided by express repudiation on his coming of age. The mere execution of another conveyance in favour of a different person from the transferee was held to be insufficient to establish avoidance of the contract [*Siriwardene v. Banda*, 2 C. L. R. 99; 1 S. C. R. 218; *Selohamy v. Raphael*, 1 S. C. R. 73]. The authorities were, however, reviewed by the Supreme Court in the case of *Gunasekere v. Baron* [5 N. L. R. 273; 2 Br. 402], and it was there held that a deed, such as a

Minor's contracts altogether void.

donation, by a minor to his prejudice, unassisted by a guardian, was null and void, and could not be ratified on his attaining majority. The same result was arrived at about the same time by two Judges, other than those who sat for this case, in the case of *Andris v. Abanchi* [3 Br. 12]. In *Muttiah v. De Silva* [1 N. L. R. 358] it was held that contracts by a minor, if beneficial to him, would bind the other party; and that a contract entered into with the authority of his father would bind an unemancipated minor subject to his right, in certain cases, if the contract was a detrimental one, to apply to the Court for the remedy of *restitutio in integrum;* but that this remedy was not available in cases in which a minor practising a trade or profession incurred liabilities in the course thereof. In this case Bonser, C.J., further held that trading was not of itself sufficient to emancipate a *filius familias* so long as he lived under the father's roof, and where a minor and his father, trading together, had granted a joint and several promissory note, the plea of minority was not open to the minor, as the note must be presumed to have been made with the consent of the father.

They bound the other party.

Emancipation of minor.

Minor as recognised agent.

A minor holding a general power of attorney for his principal abroad is competent to act as his "recognised agent" under section 24 of the Civil Procedure Code [*Somasundaram v. Ibrahim Saibu*, 1 N. L. R. 297].

Minor cannot adiate inheritance.

Minors cannot adiate an inheritance, and cannot be sued as heirs in possession [*Pattiman v. Kanapati*, 1 Br. 119]; but a guardian duly appointed for all purposes over their persons and property may adiate for them [*Silva v. Fernando*, 3 N. L. R. 15].

Can he contract within the penal provisions of a statute?

The question whether a minor can contract himself within the penal provisions of a statute has not yet been the subject of definitive decision. The observations of Burnside, C.J., in the case of *Allagan v. Allagey* [1 S. C. R. 42] would seem to show that he is inclined to answer it in the negative, while Lawrie, J., in

Dorasamy v. Meenatchi [1 S. C. R. 246] says that the question whether a minor is liable to punishment for desertion under Ordinance No. 11 of 1865 depends on the age and mental and bodily capacity of the accused, and the mere fact that he is under twenty-one years of age will not relieve him from responsibility and punishment for wilful desertion.

Minors bound to make restitution.

All persons, even minors, who have their understanding may be acceptors of a promise [Grot. 3. 3. 34]; and minors and others who cannot bind by contract, and very young children and madmen who are not liable for delict, are nevertheless bound to make restitution in so far as they have been benefited or, but for such restitution, would have been benefited. What minors have lost or spent extravagantly is not regarded as benefit, but what they have expended out of necessity or what would otherwise have to be taken out of their estates is [Grot. 3. 30. 3].

Overpayment to or by minor.

A minor who has been overpaid is bound to refund in so far as he has been benefited. On the other hand, a minor who makes an over-payment confers no ownership on the receiver, and is entitled to recover his money, or whatever he has given in payment, by a real action, or, if it is not to be found, to claim restitution, even though the debt were of such a nature that its payment would, in the case of another, have been valid under natural law ; but, if the minor has no interest in reclaiming payment, the payment will be considered as properly made, and the minor as released from the debt [Grot. 3. 30. 11].

Minor may bind person without being bound.

In all contracts a minor may bind a person contracting with him, but without being himself bound, unless, as already observed, the contract is accompanied by the enjoyment of benefit or by delict [Grot. 3. 6. 9].

Since a ward is not himself civilly liable on contracts entered into without the guardian's assent, he may, where a bilateral contract has already been fulfilled,

Minor not bound in respect of what he has received on contract further than he has benefited thereby.

recover back a thing which he has parted with; he is not bound in respect of what he may have received further than to the extent to which he has benefited thereby. If, on the other hand, he desires to sue on a contract which is perfect but not yet fulfilled, he ought either to fulfil the entire contract or wholly recede from it [V. d. K. 529].

Minor cannot be arrested for debt.

As a minor has not the capacity to appear in Court, he cannot be arrested for debt. Generally, those subject to the power of curators cannot be arrested [Voet 2. 4. 36]; and here it may be observed that tutors and curators, attorneys, testamentary executors and other administrators of the things of others cannot also be arrested for the debts of those whose affairs they manage [Voet 2. 4. 37].

Nor can tutors, curators, &c.

Minor could not appoint attorney at law.

Minors could not validly appoint an attorney at law to conduct their suits, but whatever an attorney not properly appointed gained for a minor accrued to his benefit [Voet 3. 3. 2].

Minors, &c., not admitted to plead in law.

Minors under seventeen, infamous persons, women, and the blind were not admitted by the Dutch Law to plead for others in Courts of Justice. If, however, such were allowed to plead without prohibition by the Judge, the result of the pleading was not to be regarded as invalid [Voet 3. 1. 2].

Parental power.

Parental power under the Roman-Dutch Law consisted in the entire direction of the maintenance and education of the children and the management of their estate. It gave also to the parent the right to exact reverence and obedience, and in cases of improper conduct to inflict such moderate chastisement as might induce amendment [V. d. L. 1. 4. 1.; V. L. 1. 13. 1]. It was possessed not only by the father, but by the mother, and after the death of the father by the mother alone [V. d. L. 1. 4. 1].

Custody of children under

Under the English law, the custody of a legitimate child belongs to the father; of an illegitimate child

to the mother [*Rex v. De Manneville*, 5 East. 221; *Reg. v. Nash*, 10 Q. B. D. 454; 13 C. R. C. 24]; and it has also been held in England that a father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even if they are wards of Court. The grounds for the interference of the Court with the paternal authority are—(1) that the father has forfeited his rights by gross moral turpitude; (2) that he has by his conduct abdicated his paternal authority; or (3) he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court [*In re Agar-Ellis*, 24 ch. D. 317; 13, C. R. C. 30].

English law. Direction of education and bringing up of children.

Under the Roman Law, grandsons born of a son still under the parental power were in the power of their grandfather; but under the law of Holland, the grandsons were in the power of the father only and not of the grandfather, and not even on the death of the father did they fall under the power of the grandfather. Of course, the son himself was freed by marriage from the paternal power [Voet 1. 6. 3].

Son was under power of father, not of grandfather.

Son freed by marriage from parental power.

No marriage could be entered into by the children without the consent of their parents. The consent of the grandparents was not required [Voet 1. 6. 3; V.d. L. 1. 4. 1]. The parents, moreover, were entitled to appoint guardians for their children by will. The children could not, while minors, bind themselves to a third person without the consent of their parents. The children, male and female, might, however, when of the age of fourteen and twelve years respectively, dispose of their property by will [V. d. L. 1. 4. 1]. The father had no usufruct in his children's property, and might not by last will exercise the right of pupillary substitution with respect to his young children, but had to allow their property to pass by intestate succession [Grot. 1. 6. 3].

Parents appointed guardian for children.

Children may dispose of property by will.

Children may be maintained by means of their own property.

Although a father has no usufruct in the adventitious property of a minor son, yet he may legally claim to have his children maintained therefrom [V. d. K. 105].

Venia agendi.

Children could not proceed at law against their parents, except with the leave of the Court, which was termed *venia agendi* [V. d. L. 1. 4. 1].

Liability of parents and grandparents to maintain children and grand-children.

Parental power in a more or less modified form is recognised even at the present day. In return for it and the duty which the children owe their parents, there are the education and support due to the children from their parents according to their means and condition in life, which may be lawfully required of them, except where the children are able to support themselves by some trade or handiwork, or some property has been derived or acquired by them from third parties, the fruits whereof may be expended towards their maintenance. The education and maintenance of the children are a common duty incumbent as well upon the mother as upon the father, although the children were born out of wedlock. But if one of the parents has no adequate means or ability, then the other would be liable for the entire maintenance. Bastards of whom the father is known must be supported by him as well. In case of doubt it must be proved who is the father. If the father and mother are dead, or are without any means of support whatever, the maternal as well as paternal grandfather and grandmother are obliged to maintain the children [V. L. 1. 13. 7].

Parental power how acquired.

The parental power is acquired by lawful marriage. Children born out of wedlock are not under the power of the father, but are subject to that of the mother, as by the Dutch Law the mother made no bastard. It is also acquired by legitimation of natural children [V. d. L. 1. 4. 2]. The acquisition of parental power by adoption was not known to the Dutch Law [V. d. L. 1. 4. 2.; V. L. 1. 3. 3, see p. 40 *supra*].

Adoption.

Parental power ceases (1) by the death of the parents. Here, if the children are yet minors, they are placed under the power of guardians ; (2) by the lawful marriage of the child. The son thus becomes a major, and the daughter passes from the paternal to the marital power, and if her husband die during her minority she does not return under the paternal power ; (3) by majority, whether attained by arriving at the age of twenty-five years [twenty-one in Ceylon—see p. 62 *supra*] or by favour of the Sovereign—*Venia ætatis ;* (4) by tacit or indirect emancipation, when the children with the previous knowledge of the parent take up a residence elsewhere, and exercise openly any trade or calling [V. d. L. 1. 4. 3 ; V. L. 1. 13. 4 *et seq.*].

How parental power ends.

Letters of *venia ætatis* were grantable by the Sovereign or supreme authority of the State to persons who from their conduct and discretion were deemed capable of managing their own affairs [Voet 4. 4. 3, 5 ; *Cens. For.* 1. 1. 18. 8]. For the purpose of granting these letters authority was, in Holland, ordinarily vested in what was called the Provincial Department, which usually acted on letters from the Magistrate of the domicil of the applicant who previously heard the parents, and did not recommend in the case of a male under twenty and a female under eighteen years of age [V. d. L. 1. 4. 3].

Venia ætatis.

This privilege did not enable the minor to alienate his real property, unless the grant gave him an express authority for that purpose. It, however, had the effect generally of preventing the minor from being relieved from acts done by him after he had obtained it [Voet 4. 4. 5 ; *Cens. For.* 1. 1. 18. 8]. But the marriage of a minor conferred on him every capacity incident to majority, including that of the most free alienation of real property [1 B. 117]. Voet, however, having laid down that marriage causes a minor husband to be forthwith considered a major [4. 4. 6], says that majority conferred by law in this way or by the ruler

Alienation of property by minor to whom letters of *venia ætatis* have been granted.

Majority by marriage.

of the domicil cannot, according to better opinion, be extended or made operative except as to goods situated within the territory of the legislator or ruler [4. 4. 8].

Does marriage confer majority on women?

A man becoming a widower before arriving at the age required for majority by law does not, according to better opinion, revive his minority. A woman under age and married is not at any time considered a major. Relief by restitution, however, is not allowed to her for contracts entered into by her with the consent of her husband, because in such a case he is rather taken to have contracted as his agent. If the marital power with reference to a wife's property is restricted so that without her consent he cannot alienate or burden it, a wife under age may successfully seek in respect of contracts relief by way of restitution. After her husband's death a woman does not fall back under her father's or her tutor's authority, nor is she bound, if unwilling, to receive a fresh guardian. "Yet," says Voet, "she is not a major, but is rather to be likened to those minors of the Roman Law who, freed by their curator's death from his guardianship, were not bound, if unwilling, to receive another curator, and yet remained in the category of minors, not being denied 'the benefit of restitution'" [Voet 4. 4. 9].

A woman under age at the time of marriage attains majority on arriving at the age prescribed by law, although even then, in consequence of the husband's marital power over her, her condition is likened to that of a minor [Voet 5. 1. 14].

Majority that is implied in wills and agreements.

Although a person who by reason of letters of *venia ætatis* or marriage is deemed a major in reference to the administration of his affairs and the like, yet if any one has desired either by will or agreement to give anything, or that something should be done, and shall have mentioned legal age, the majority attained by arriving at the age prescribed by law and not that

conferred by royal favour or induced by marriage will be taken to have been intended [Voet 4. 4. 11; 1 B. 118].

Van Leeuwen lays down the position as follows—"Although marriage, just like *venia ætatis*, renders a person as of full age, *i.e.*, *sui juris aut suæ tutelæ;* still a person under twenty-five years and married is, in some cases, not considered to be of full age, *e.g.*, *in contractibus et ultimis voluntatibus, ubi precise*, it is stipulated that something is to be done, &c., at the time of majority: *ubi tum verba naturaliter et vere, non ficte ac civiliter sunt intelligenda*" [V. L. 1. 12. 2].

Guardianship.

Guardianship, under the Roman-Dutch Law, was the legal custody of the person of another who by reason of his tender years was unable to protect himself.

Curatorship.

Curatorship was such custody when the inability of the person placed thereunder to protect himself was due to mental or corporeal incapacity [V. L. 1. 16. 1; V. d. L. 1. 5. 1].

Committee of the person.

In the English Law, a curator in cases of idiotcy and lunacy is termed the Committee of the Person; but the appointment of a curator to a person, as a prodigal, who is likely to bring himself and family to ruin, is unknown to that law [V. d. L. Tr. by Henry, p. 97, n].

Guardian appointed by Court bound to accept trust.

As a general rule, a guardian appointed by the Court was bound to accept the trust; and in case of refusal might be constrained by gyzeling [V. d. L. 1. 5 1; V. L. 1. 16. 5].

Orphan children.

Orphan children who were minors were placed under guardianship [*Ibid.*].

Married women minors by marriage.

All married women were minors by marriage, and were ordinarily under the guardianship of their husbands [Grot. 1. 4. 6].

Authority of guardian to bind minor.

Minors may be bound by their guardians in matters relating to their property; that is to say, if the minors can obtain indemnification from their guardians. Donation or release from a manifest right, however, if granted by a guardian, is not in the least binding on

Delict of guardian.

the ward, nor is the guardian's delict, except in so far as the minor may be benefited thereby [Grot. 3. 1. 30].

The Ceylon Code of Civil Procedure, although it makes provision regarding the appointment of guardians and the administration by them of their wards' estates, does not limit the powers conferred on guardians by the Roman-Dutch Law. A guardian may sell immovable property with the sanction of the Court. The sale should be by public auction with a reserve price put upon the property by the Court, which should also give directions as to the manner of sale and of the investment of the proceeds thereof [*Perera v. Perera*, 1. N. L. R. 140]. Where the guardian, who was also the mother of the ward, applied for an order to encumber certain property, to the reversion of which the ward was entitled, but in which the guardian had a life interest in her own right, it was held that, although, by the Roman-Dutch Law, the Court had a discretionary power to allow an application for the alienation or encumbrance of the property of wards, yet it could not grant such an application (1) unless fully satisfied that the alienation or encumbrance would be for the permanent advantage of the ward, and (2) unless all parties interested had due notice of the application, and a regular order or decree was passed after full inquiry and adjudication, and (3) if it appeared that the guardian was acting partly for his own benefit, unless the ward was represented by a special guardian *ad hoc* [*In re* the last will of Hider, 3, S. C. C. 46]. A guardian could not even mortgage the ward's property for the maintenance of the latter without the sanction of the Court [Vand. D. C. 66]; and leases by a curator which require to be notarialy executed are void without such sanction [*Perera v. Perera*, 3 Br. 150].

Power of guardian to sell immovable property of ward.

The question of the guardian's power to sell the immovable property of the ward was fully considered in the case of *Mustapha v. Martinus* [6 N. L. R. 364],

and it was there held that he could sell such property only (1) when a sale was necessary for the payment of debts, (2) for the maintenance of the ward, and (3) when a sale was clearly for the benefit of the ward; but such sale was not valid if it is not sanctioned by the Court. Where a guardian fails to deposit monies of the minor in Court, he is liable in interest [Vand. D. C. 108].

Who are prohibited from being guardians.

Persons prohibited from becoming guardians are those who are themselves under guardianship or curatorship, and all females, except mother and grandmother if not married again [V. d. L. 1. 5. 1.; Grot. 1. 7. 6]. Persons under the age of twenty-five years, though they had obtained *venia ætatis* or had become *sui juris* by contracting marriage, are not admitted to the guardianship of others [V. d. K. 112].

Right of father, &c., to be guardian.

Father and mother, grandfather and grandmother, if competent, are preferred to all others in the guardianship of their children and grandchildren. This guardianship the father and grandfather retain for their natural lives, but the mother and grandmother only until they marry again, and generally under good security and with renunciation of the privileges to which women are entitled. Neither father nor grandfather, mother nor grandmother, however, are appointed otherwise than jointly with another co-guardian or co-guardians. In the matter of the distribution of the estate and in the event of disputes between them and their children their guardianship is suspended, and another guardian appointed temporarily in their stead [Grot. 1. 7. 11]. In some places in Holland a father who had been appointed by the Orphan Chamber, if he contracted a second marriage, laid down the office. He might, after he had rendered accounts, be re-appointed. One or more guardians on the side of the father were, if possible, associated with the mother, if the Orphan Chamber had appointed her

Account by father on contracting a second marriage.

guardian. As regards a father the same provision had not been made everywhere [V. d. K. 121, 122].

Mother as guardian.

In Ceylon, it is not usual to associate another person as co-guardian with the father, but in the case of a mother married in community and surviving her husband, although she has a preferential right to be appointed guardian of her children, the Court should name some other person to act with her so as to safeguard the interests of the children [*Perera v. Perera*, 1 N. L. R. 140]. Even in the case of a Moorish widow, it has been held that, unless she is shown to be incapable of acting, she is the proper person to be appointed guardian of her minor children [*Ex parte Assen Natchia*, 7 S. C. C. 22]; but a mother on the father's death is not *ipso facto* clothed with the powers of a guardian: she must be duly appointed by the Court under Chapter 40 of the Civil Procedure Code [*Gunesekere v. Baron*, 5 N. L. R. 273].

Military men, debtors, creditors, &c., as guardians.

Military men were not prohibited, but might excuse themselves from this office. Debtors and creditors of the estate of the children for a considerable sum might, according to the discretion of the Judge, be removed from acting as guardians. Clerks in the Secretary of State's or Revenue Department could not, without the knowledge of their principal, undertake this office [V. d. L. 1. 5. 1]. The Judge might at his discretion excuse from this office certain persons, *e.g.*, those who were already burdened with three guardianships or who were above seventy years of age, or who from sickness or bodily infirmity were hardly able to attend to their own affairs [*Ibid.*]. A person whose claim to be excused was not entertained might appeal, and then in the meantime another guardian was appointed provisionally [*Ibid.*].

Who may be excused.

Wife never appointed guardian of husband.

A married woman being deaf, dumb, or incapacitated by other like infirmity has her husband as guardian; but a wife, being a minor in the eye of the law, was

never appointed guardian over his property, though she might sometimes be allowed the management of the property [Grot. 1. 11. 7]. A married woman could not be appointed curator over her husband if insane or prodigal [V. d. K. 168].

How guardians are appointed.

Guardians to minors were appointed by will or codicil or by special act of guardianship executed by father or after his death by mother [V. d. L. 1. 5. 2; V. L. 1. 16. 3; Grot. 1. 7. 7, 8]. As regards testamentary guardians it made a great difference whether they had been appointed simply or with exclusion of the Orphan Chamber. In the former case they were bound to render accounts to the Orphan Chamber. In the latter they were independent of its supervision [V. d. K. 120].

Testamentary guardians.

In some places in Holland it was necessary that testamentary guardians should be confirmed by the pupillary Magistrate, and might even be rejected if they were not fit persons. At other places, however, when the Orphan Chamber was excluded, the guardian was merely bound to produce the *grosse* of the last will by which he had been appointed, and to undertake the guardianship [V. d. K. 116].

Co-guardian to be appointed by surviving spouse.

If guardians had been appointed by the first dying spouse, the survivor might afterwards appoint co-guardians with equal power, and this applied to children born as well as unborn [Grot. 1. 7. 9].

Appointment by the authorities.

When no provision for guardians had been made by last will, they were appointed by the authorities: that is, by the Court of Holland, by the Town or Provincial Courts, or by the Orphan Chamber. The authorities were accustomed in appointing guardians to take the advice of the nearest relations, and even to choose the guardian from amongst them, if that could at all be done with advantage to the ward [Grot. 1. 7. 10; V. d. L. 1. 5. 2].

Natural guardians.

Natural guardians, otherwise termed legitimate guardians, were not in use in Holland when Grotius

Appointment of guardians by strangers.

wrote [Grot. 1. 7. 7, 8]. Strangers who left an estate or legacy to the children of others appointed guardians for them. This was not, however, a personal guardianship concerning maintenance and education, but a real guardianship regulating the administration of the property bequeathed [V. d. L. 1. 5. 2].

Guardians may apply to be excused.

Guardians, whether testamentary or dative, were at liberty to apply to the Court to be excused on the ground of inability or inconvenience. This application was liberally considered, but no one could claim exemption as of right. Those aggrieved by the decision of the Court might appeal to a higher tribunal, but in the meantime one or more other guardians were appointed in their stead, and at their cost, if the matter was ultimately decided against them [Grot. 1. 7. 14].

Security by guardians.

Latterly, in Holland, guardians were not required to give security. Sometimes personal security was taken, and ordinarily their oath, especially in the case of testamentary guardians, was deemed to be sufficient [Grot. 1. 9. 1; V. d. L. 1. 5. 3].

Duties of guardians.

Under the Roman-Dutch Law the duty of a guardian consisted, in the first place, in making an inventory of the goods of the children, or in demanding this from the surviving parent who remained in possession [V. d. L. 1. 5. 3; Grot. 1. 9. 3]. The person from whom he had the right to demand the inventory was bound to deliver one confirmed on oath within six months, unless he was exempted by last will from doing so, or was excused by the Court [Grot. 1. 9. 3]. If any property was omitted in the inventory, he forfeited his share in such property [Grot. 1. 9. 4]. The guardian had to hand the inventory to the nearest relatives on the side of the deceased parent, and was bound to render accounts annually to the Orphan Chamber [V. L. 1. 16. 6]. If there was no father, mother, step-father, or step-mother in possession of the estate, the guardian had, with the assistance of the next of kin, to make the inventory and deliver it

Inventory by guardian.

to the Court or Orphan Chamber to be afterwards supplemented, if further property was found [Grot. 1. 9. 8].

Maintenance of ward.

The guardian had to take care that the ward was properly maintained and educated according to his estate [V. d. L. 1. 5. 3]. The guardian could have this done either by the surviving parent or any next of kin able and willing to do it in the best and cheapest manner, or, failing any such, by other respectable persons. He must also have his ward taught a trade or something else in accordance with his circumstances. The surviving parent was bound to maintain sons till eighteen years of age and daughters until fifteen out of the fruits of the property apportioned to the children at the division of the common estate, unless otherwise directed, for weighty reasons, by the Court or the Orphan Chamber [Grot. 1. 9. 9].

Care to be exercised by guardian.

The guardian must exercise proper care for the preservation of things of substantial value. He had charge of the property when the Orphan Chamber was excluded; otherwise, the Orphan Chamber had charge of it [V. d. L. 1. 5. 3]. Where several guardians had charge of the property, they were bound to manage it themselves, or by giving authority to one of their number for the purpose, all, however, remaining responsible [Grot. 1. 9. 11]. Guardians might claim remuneration in respect of their administration of the guardianship, unless they were relations in the ascendant line, to whom it was not in some places allowed [V. d. K. 156].

Management of property in case of a plurality of guardians.

Remuneration to guardians.

Guardian must collect debts, invest monies, &c.

The guardian was bound to collect debts and invest monies in Government securities yielding interest. Other investments required the sanction of the Court to protect the guardian, in case of unforeseen loss, from personal liability. Such sanction was required generally in all transactions of importance, *e.g.*, in the continuing or discontinuing of any trade or business [V. d. L. 1. 5. 3].

Sanction of Court.

Guardian liable for interest.

If funds were not properly invested by the guardian but retained by him without the consent of the Court or the Orphan Chamber, the guardian was obliged to pay the ward interest. The guardian had to take care that money put out at interest was secured by proper mortgages or good personal securities *singuli in solidum*, and it was necessary that the principal debtors and the sureties should stipulate [a privilege peculiar to minors] that the debtors were to pay up the capital when the ward came of age [Grot. 1. 9. 10].

Office indivisible.

The office of guardian is indivisible. In the case of several guardians each is responsible for the acts of the others [V. d. L. 1. 5. 3]. But if the guardianship was divided by the authorities or by last will, each guardian was only liable for his part of the management. Even in cases in which the guardianship remained undivided, each of the guardians might claim a division of the debt or liability; that is, if the other guardians were able to pay or had given good security.

Liability of guardian who actually managed affairs of ward.

Whoever had not himself had the management of affairs nor authorised any other thereto might demand that the guardian who had had the management and his sureties should first be excussed. A guardian who had paid the whole of any debt had his remedy against his co-guardians, even though he had not taken cession of the ward's right of action. In this respect the rights of guardians were more extensive than those of sureties [Grot. 3. 26. 9].

"Administering guardian."

In the case of several guardians over one ward, one of them was usually appointed or selected as the "administering guardian" or "receiver." It was his duty to render accounts to the other guardians and to

Liability to render accounts.

the Orphan Chamber and nearest relations. Where there was no administering guardian, all the guardians were bound to render accounts to the Orphan Chamber, if not excluded, and to the nearest relations [Grot. 1. 9. 12]. The account was rendered annually; and

whatever balance there was in favour of the ward the guardian was bound to invest, or in default to pay interest. He was further liable for all losses sustained by the ward through his bad faith or negligence, but not for losses occasioned by accident [Grot. 3. 24. 7, 8]. Liability for negligence.

Father, mother, grandfather and grandmother might not claim any remuneration for guardianship, but other guardians, if they were dependent on their labour for a livelihood, and if they desired it, received remuneration at the discretion of the Orphan Chamber or the Court. In the case of large estates the guardian might appoint a receiver. A receiver so appointed was entitled to remuneration [Grot. 1. 9. 11]. Remuneration to guardian.

The liability of guardians commenced on the day they entered on their guardianship. Hence liability of their property on tacit mortgage also commenced then [Grot. 2. 48. 37]. When liability of guardian commenced.

Parents or guardians who were negligent in their duties treated on above were summarily compelled thereto by civil imprisonment or condemnation to give security [Grot. 1. 9. 13].

Under the Dutch Law, when the surviving parent was about to enter upon a second marriage, he or she was required to make an inventory of the property of the children by the first marriage. The property thereafter generally remained in the possession of the parent until the children attained majority, and they were in the meantime maintained from the usufruct or interest. Here, the duty of the guardian was simply to make a strict inquiry into the enumeration, valuation, &c., of the property. He had nothing to do with the order or disposition of the property itself [V. d. L. 1. 5. 4]. Surviving parent entering on second marriage.

When the surviving parent remained in possession of the property [*boedelhouderschap*] he being at the same time guardian, and made no inventory of the property *Boedelhouderschap.*

or do any act of that nature, and did not purchase or redeem the interest of the children therein [*Uitkoop*], the consequence was that the community of goods still existed between the parent and the children, so far that the children enjoyed one-half of all the profit made during this community, but were not subject to the losses, which fell entirely on the surviving parent. This was accepted as law where there were no local Ordinances to the contrary [V. d. L. 1. 5. 4].

The surviving parent, however, was often compelled to grant to the ward a division of the estate before the Orphan Chamber or the Court, at least before he or she contracted a second marriage, unless the Court or the Orphan Chamber thought some other course more advantageous [Grot. 1. 9. 6]. This division was effected either by buying out at an appraised value or by lot [Grot. 1. 9. 7].

Legal proceedings conducted by guardian.

Legal proceedings were conducted in the name of the guardian, who was entitled at the same time to the administration of the property [Grot. 1. 7. 8 ; V. d. L. 1. 5. 5]; but he could not commence an action, especially on a doubtful point, without the permission of the Court or the Orphan Chamber on pain of personal liability for the costs [V. d. L. 1. 5. 5]; and if the guardian himself had any dispute with his ward, one or more other guardians were appointed for the management of the matter [Grot. 1. 8. 4]. The guardian might compromise any doubtful claim or matter [V. d. L. 1. 5. 3]. Minors in case of any serious crime were obliged to appear for themselves in Court [Grot. 1. 4. 2.; V. d. L. 1. 5. 5].

When minor may be sued without antecedent appointment of guardian.

A minor, especially in an action for tort, may be sued without the antecedent appointment of a guardian *ad litem* to defend him. If then the minor himself takes no steps or no steps are taken on his behalf to have a guardian *ad litem* appointed, the plaintiff should procure the appointment of a guardian in order that he

may continue the action [*Paramanather v. Paramanather*, 3 N. L. R. 79; D. C., Colombo, 5,015, S. C. Civ. Min., 5th April, 1895; *Constantinu v. Perera*, 1 C. L. R. 31]. In the last case it was held that where a minor appeared through a proctor he should be required to have a guardian appointed, and a plea of minority through the proctor should not be entertained.

Under the Indian procedure even a duly appointed guardian must be specially appointed next friend to enable him to institute an action on behalf of the minor [see sect. 446, par. 2, Ind. Code]. In *Gunesekere v. Abubaker* [6 N. L. R. 148] it was held that an action by a minor was not well brought if brought in the name of his curator appointed under section 585 of the Civil Procedure Code; and that before suing, even a curator so appointed should obtain the authority of the Court to institute the action as the next friend of the minor and in his [the minor's] name.

Where a minor, being erroneously thought to be a major, is allowed to appear in Court without a curator, a judgment against him is null and void, while one in his favour is operative [Voet 5. 1. 11].

Wills of wards.

Wards who had arrived at years of discretion might make wills without the consent of their guardians [V. d. L. 1. 5. 5; Grot. 1. 8. 2]; but neither the guardians nor their children might take any immovable property under such wills either by way of inheritance or of legacy [Grot. 1. 8. 2].

Marriage of ward.

Unless the law of the place expressly required it, consent of the guardian was not necessary to the validity of the marriage of the ward [V. d. L. 1. 5. 5; Grot. 1. 8. 3]. It was not void even if it had been prohibited by the guardian or nearest relations; but one who married a young man under twenty-five or a young woman under twenty without the consent of father or mother, or, if they were dead, of the nearest relations or the local authorities, could not take from

his or her wife or husband by last will, gift, transfer, or in any other way whatsoever, even though the consent be obtained after the completion of the marriage [Grot. 1. 8. 3]. Consent was understood as tacitly given if the banns had been published without any objections being lodged [Grot. Tr. Maas. 37, n.].

Consent of guardian.

Guardian might contract for ward.

The guardian might contract on behalf of the ward, but was bound to proceed with caution; otherwise, he was liable in damage [Grot. 1. 8. 7]. He could not burden or alienate the immovable property of the ward, or monies put out at interest and rents and government securities of the ward, except with the permission of the Court of Holland [V. d. L. 1. 5. 5; Grot. 1. 8. 6]. The Court had to make thorough inquiry, consulting, if necessary, the nearest relatives, and if it was found necessary to encumber or alienate the property of the ward in order to pay debts or for his maintenance, or if such encumbrance or alienation was otherwise to the manifest advantage of the ward, the Court gave its consent thereto. The sale was to be by public auction after due advertisement; otherwise, it was void, and the guardian was held liable in damage, if any [Grot. 1. 8. 6], unless the ward had suffered absolutely no loss by the underhand sale [Grot. Tr. Maas. 39, n.].

Permission of Court.

Court to make inquiry.

Sale by public auction.

Contract of ward void.

Wards under age might not burden their money or other property by act *inter vivos*, or bind themselves otherwise than by delict. Contracts entered into by them, even though confirmed by oath, could not be judicially enforced. They might, however, stipulate for something to their advantage, and might be sued in so far as they had been enriched by the contract [Grot. 1. 8. 5].

The contract of a ward who, even after attaining puberty, has bound himself without the consent of his guardian is clearly invalid, nor is it so confirmed by an oath as to render it necessary to obtain *restitutio in integrum* against it [V. d. K. 128].

Guardians were bound to do everything of importance with the knowledge and advice of the Orphan Chamber, unless it was excluded by will. The Court retained its upper guardianship in case of need [Grot. 1. 9. 2]. In the alienation of the more valuable property of the ward, he himself, if above eighteen years, should be consulted [V. d. K. 129].

Ward to be consulted in alienation of property.

The ward might in due time sue or be sued on any contract entered into by his guardian on his behalf. He, however, had his right to *restitutio in integrum*, if damnified by such contract. This he had to prosecute within four years after attaining majority [Grot. 1. 8. 8].

Ward may be sued on contract of guardian.

The ward or, in case of his death, his representative, may sue the guardian or his heirs and each guardian *in solidum*, so that on full satisfaction by one the others shall be freed, for an account and giving over of the property in their hands as also to answer in damages for all losses suffered by mal-administration [V. d. L. 1. 5. 6]; and the guardian and his representatives may sue the ward and those who succeed to his rights for payment of all disbursements and indemnity as well as for a release at the foot of the accounts and transactions of the guardianship and for reasonable compensation for his time and labour [V. d. L. 1. 5. 6].

Action to ward against guardian.

Suit of guardian against ward.

The guardian is bound to the ward and the ward to the guardian as though a mandate subsisted between them. This holds good not only when a person has been lawfully appointed guardian, but also when he has conducted himself like one [Grot. 3. 24. 5, 6]. The ward is liable to make good to the guardian all losses sustained by him by reason of the guardianship and all expenses incurred *bonâ fide*, even though the transaction may not have turned out successful, but not if he has entered into a groundless law suit or if he has been extravagant in incurring expenses [Grot. 3. 26. 10].

Guardian and ward bound to each other even where guardian was not legally appointed.

Guardian to cede personal claims.

Guardians may be called upon to cede the personal claims which they have acquired by virtue of their management, and if they refuse to do so, or are unable on account of insolvency, the cession is regarded as actually made [Grot. 3. 1. 38].

Preference on goods of guardian.

Minors, prodigals, and insane persons have preference on the goods of their guardians or curators [Voet 1. 4. 16].

How guardianship ends.

Guardianship ends—(1) By the death of the ward. Here the guardian must account to his heirs. (2) By the death of the guardian. The guardianship then passes to those whom the guardian has appointed by his will, if he had the power of surrogation, or on failure to the Court. (3) By the majority of the ward, which is twenty-five and twenty years respectively for males and females, unless the Court decides that the guardianship is to continue some time longer [Grot. 1. 10. 1-6]. (4) By marriage of the ward. (5) By the obtaining from the Sovereign of the writ of *venia ætatis*. (6) By the cause which has given rise to the guardianship ceasing, as when this is limited to a certain and particular act. (7) By the removal of the guardian on account of improper conduct or unfitness for the office. This is left to the discretion of the Court [V. d. L. 1. 5. 7; V. L. 1. 16. 10].

After marriage of ward.

Sometimes, after the marriage of the ward, the Court, for weighty reasons, continues the guardianship either wholly or only with respect to the immovable property of the ward [Grot. 1. 10. 1-6].

Guardian released from guardianship may not alienate his property.

In the case of those who are released from guardianship either by the Sovereign or the Court of Holland or any other Court legally empowered thereto, they might not alienate their immovable property except with the knowledge of the Court, unless they had for weighty reasons been expressly authorised thereto by the Sovereign [Grot. 1. 10. 1-6].

How letters of *venia ætatis*

In order to obtain *venia ætatis* it was necessary that the minor, if a male, should have attained the age of

twenty, or if a female, eighteen. The application was made to the Supreme Power [in still earlier times to the States] by petition wherein the above age was stated and proved, and on this petition the pupillary Magistrate and the Orphan Chamber, after having heard the guardians and relations, gave their advice, after which *venia ætatis* was granted by rescript [V. d. K. 161]. were obtained.

Guardian removed on complaint of relations of ward.

When relations of the ward or co-guardians complained of the incapacity, dishonesty, or insolvency of a guardian, the Court, on being satisfied with the grounds of complaint, removed the guardian provisionally or definitively, even though the accused guardian tendered security [Grot. 1. 10. 1–6].

Absence of ward from country sixteen years.

Guardianship also expired by the absence of the ward from the country for sixteen years without anything being heard of him. In this case his property was divided among his next of kin under security [Grot. 1. 10. 1–6].

Guardianship also terminated when the time expired or the condition failed or the matter ceased for or subject to which the guardian was appointed [Grot. 1. 10. 1–6].

Curators under the Roman-Dutch Law.

Under the Roman-Dutch Law the office and duties of curators were in general the same as those of guardians. The difference was confined substantially to these points—(1) The foundation of all guardianship was minority; that of curatorship was mental or corporeal incapacity. In the case of insanity, if it approached to dangerous madness the power of confinement was added to that of curatorship. Prodigals, that is to say, those who scandalously wasted their property, were also placed under curatorship. Sometimes reasons might exist to justify personal confinement in their case, if, for instance, excessive drunkenness has led to their prodigality, or there is reason to apprehend their being prevailed upon in such fits to antedate any act or obligation which they may execute. (2) Guardians

might be appointed by private persons; curators only by the Court on previous inquiry. The appointment of curators further required proclamation and notice. (3) Curatorship ceased only by order of the Court which granted it [V. d. L. 1. 5. 8; Grot. 1. 11. 1].

Deaf and dumb persons or such as from other serious incapacity were unable to take care of themselves or their affairs were placed under curatorship [Grot. 1. 11. 3].

Prodigals.

Where prodigals were deprived of the administration of their own property, notice had to be given to the public, and curatorship continued until the ward improved and public notice was given of the fact [Grot. 1. 11. 4].

The law as to minors and guardians applied equally to wards of full age and their curators [Grot. 1. 11. 5].

When a ward of full age subject to any of the infirmities mentioned above married, curators were appointed over him and his property, one from his side and one from his wife's side [Grot. 1. 11. 6].

Sequestration.

Sequestration, which is a species of judicial provision relating to property only, is the appointment of a representative for an absentee in an inheritance, or to administer and liquidate an estate whereof the heirs are not known, or an abandoned estate encumbered with debts and the like [V. d. L. 1. 5. 8].

Special nomenclature of the Civil Procedure Code.

We have said above that under the Roman-Dutch Law the foundation of all guardianship was minority, that of curatorship was mental or corporeal incapacity. Those appointed to take care of the person and property of minors were "guardians," and those appointed over persons suffering from mental or corporeal incapacity were "curators." In considering, however, some of the propositions of law enunciated above, it must be remembered that the Ceylon Civil Procedure Code adopts a nomenclature of its own in treating on the subject of those having control over the persons, and

charge of the property, of minors and persons suffering from mental or corporeal incapacity; and the propositions referred to above are to be read *mutatis mutandis* on being applied to those falling under the special designations in the Code.

"Guardian" as used in Code.

By the Code a person appointed to take charge of the person and maintenance of a minor generally is termed his "guardian" [sect. 587], and a person appointed to have charge of a minor's property his "curator," and a "certificate of curatorship" is issued to him [sect. 582]. A person appointed to institute an action on behalf of a minor is designated his "next friend" or "guardian for the action" [sect. 477]; and a person appointed to defend a minor defendant his "guardian *ad litem*" [sect. 479]. A person appointed to administer the estate of a lunatic is called the "manager" of his estate [sect. 567], and a person appointed to have charge of his person the "guardian of the person" of the lunatic [sect. 568].

"Curator."

"Next friend."

"Guardian *ad litem*."

"Manager of estate" of lunatic.

"Guardian of person" of lunatic.

CHAPTER III.

Marriage in relation to Civil Status.

Marriage defined.

By marriage is understood the union of man and woman contracted for the purpose of procreating and rearing children and of sharing all good and bad fortune with each other until death [V. d. L. 1. 3. 1; V. L. 1. 14. 1].

Trouw beloften.

With the Dutch, marriage used to be frequently preceded by a contract [*trouw beloften*] consisting in the obligation of the parties to contract a lawful marriage with each other. This was merely the contract to marry, and is not to be confounded with antenuptial contracts to be hereafter treated on.

Requisites of contract.

It was necessary that the persons who entered into the contract of *trouw beloften* should be capable of being united in marriage; and when the man was not twenty-five years of age, or the woman twenty, the consent of parents, guardians, or relations was necessary. Without this consent the marriage would be clandestine, and bad in law [V. d. L. 1. 3. 2].

How entered into.

These contracts were entered into purely, *i.e.*, without any condition, or under condition, provided it was not *contra bonos mores* or impossible, and also on the condition of the marriage taking place immediately or after a certain time.

Action on the contract.

The contract gave a right of action for the perfecting of the marriage. The unwilling party might be constrained to the performance by civil confinement (Gyzeling) [*Ibid.*].

In what circumstances it may be rescinded.

The contract might be rescinded by mutual consent, but it could not be annulled by one of the parties in opposition to the other, not even on the ground that the marriage would be displeasing to his or her parents [*Ibid.*].

When there were lawful grounds of repudiation, the contract might be dissolved by one of the parties; as for example, a sudden and continued lunacy of one of the parties, scandalous conduct of the woman with another man, and *vice versâ*, excessive dissipation, the incapacity to have children, a manifest deceit in the contract by the concealment of considerable debts, and the like [*Ibid.*].

When it may be dissolved by one of the parties.

A young woman above twenty but under twenty-five who had entered into this contract without the consent of her parents might be freed from it [V. d. K. 55; V. d. L. Hen. Tr. 73].

Contract by young woman under twenty-five.

In Ceylon, no suit or action lies in any Court to compel the solemnization of any marriage by reason of any promise or contract of marriage, or by reason of the seduction of any female, or by reason of any cause whatsoever. No such promise or contract or seduction vitiates any marriage duly solemnized and registered under Ordinance No. 2 of 1895. Any person aggrieved may, however, sue for or recover in any court damages which are lawfully recoverable for breach of promise of marriage, for seduction, or for any other cause; but no action lies for the recovery of damages for breach of promise of marriage, unless the promise had been made in writing [Ord. No. 2 of 1895, sect. 21].

No action to compel marriage.

No action for breach of promise, unless promise is in writing.

Antenuptial contracts.

A father or brother who joins in a contract of marriage may be sued jointly with the principal (female) contracting party [3 Lor. 235]. In the case of *Tammodarampillai v. Tangamuttupillai* [2 S. C. R. 51] the plaintiff averred an agreement between him and the defendant that the defendant's daughter should marry the plaintiff within a reasonable time. He complained that the defendant had failed to perform her part of the agreement, in that she had proposed that her daughter should marry another man. There was also an averment that, according to custom, the defendant had such control and authority over her daughter as to enable

Liability of father, brother, &c., on agreements to give daughter, &c., in marriage.

her to give her in marriage. The Supreme Court held that the agreement on the defendant's part amounted simply to one that the plaintiff would have her consent to marry her daughter, and, as such, was a valid agreement for breach of which by the defendant the plaintiff was entitled to damage. It was further held that the fact that the defendant proposed that her daughter should marry another man did not constitute a breach by her of her part of the agreement.

In an action against a father for breach of promise to give his daughter in marriage it is a valid defence that the daughter has reasonable grounds of objection to contract the marriage. So, where it was shown that the plaintiff up to a short time before the marriage contract had a woman of disreputable character living with him as his concubine, by whom he had two natural children, and that the daughter, who became aware of the fact only after the contract had been entered into, objected to its being performed, the court held that the defendant was not liable [Vand. D. C. 177].

In the case of *Sinno v. Haramanis* [2 S. C. C. 136] the libel alleged a contract by a father and his minor daughter that she should marry the plaintiff, and it was held that, as regards the daughter, minority was a good defence. As regards the father, the question arose how far he was liable in law on such a contract, and Phear, C.J., while holding that the evidence failed to prove the contract on the part of the father, expressed himself on the authorities cited as follows—" In the cases No. 2,858, D.C., Galle [Morg. Dig. 210], and No. 24,468, D.C., Colombo [3 Lor. 237] it seems to have been assumed that, in the one case, the father, and, in the other, the father and his adult son had or assumed to have a power of donation in respect of, or a control over, the dependent member of the family which enabled them to contract as principals according to some custom of the country for the marriages taking

place which were the subject of these actions. But in the present instance this is clearly not so. The daughter is quite old enough, and apparently well able to judge for herself in the matter of the marriage. It does not appear that the father has ever pretended to have authority by usage or otherwise to dispose of her in marriage independently of her own will."

Damages should not be excessive.

In a case for breach of promise of marriage the poverty of the defendant should be considered on the question of damages, so that he may not be left totally destitute, while at the same time the amount should be such as to make it his interest, in case the plaintiff would still accept him, to make atonement for his misconduct [*Nagel v. de Quaker*, Ram. 20–33, 52]. In this case the Court suspended execution for two months to enable the parties to reconsider the question of carrying out their agreement to marry.

Antenuptial contracts.

Where parties desire to intermarry so as to exclude the community of goods and to exempt their union from the consequences ordinarily flowing from the law of the land applicable to marriage, they may regulate their terms and conditions by a special contract which is termed an *Antenuptial Contract* [Grot. 2. 12. 4 ; V. d. L. 1. 3. 3].

Must be in writing.

An Antenuptial Contract is not valid unless it is in writing and contained in a public instrument. An inventory or list of the wife's property is sometimes inserted in it [V. d. L. 1. 3. 3]. In the time of Grotius, apparently, antenuptial contracts might be entered into even verbally [Grot. 2. 12. 4].

Verbal at one time.

By this contract certain property is sometimes contributed by the husband and wife respectively, or by their respective parents or others *ad sustinenda onera matrimonii.* The term *dos* was used to denote this property. It is on the dissolution of the marriage to be restored to its respective owners or to others according to agreement [1 B. 313]. It is essential to the validity

Dos.

To be made before marriage.

of an antenuptial contract that it should be made before the marriage is celebrated; and when it is made, it is not in the power of the parties after the marriage to revoke or alter it [1 B. 320; Grot. 2. 12. 5].

Irrevocable.

Conditions and terms.

By an Antenuptial Contract all such conditions may be stipulated as the parties think proper, provided they are not contrary to the nature of marriage. The most usual are—(1) That the parties shall, on each side, bring in their separate property to the support of the marriage, without, however, thereby inducing any community of goods. (2) That the one shall not be answerable for the debts of the other contracted before or after the marriage. (3) That the gain or loss shall either be mutual or that the community in this shall be excluded, or that the wife or her heirs shall have the choice, on the dissolution of the marriage, to share or not in the profit and loss. (4) That the wife, for her property, on the dissolution of marriage, shall have the right of dower, legal mortgage, or preference [V. d. L. 1. 3. 4]. Even if this privilege is not expressly stipulated, yet it ought to be given to the wife whenever she has guarded her property from the *communio bonorum* [V. d. K. 247]. (5) That the wife shall have the administration of her own property without its being subject in any way to the marital power. (6) That the survivor shall be entitled to a certain sum by way of gift out of the goods of the party who dies first. These gifts are termed *Douarie*. They cannot be claimed or received until after the payment of all the debts. Whatever the spouses have promised to each other by antenuptial contract, they cannot revoke even by mutual consent by an act *inter vivos*. A wife may, however, renounce her right of legal mortgage referred to above [V. d. K. 254]. (7) The contract may also provide how, after the death of one or both of the parties, the succession to the property is to be regulated. (8) And how the goods of the children, in case they

Revocation of provisions of antenuptial contracts.

die within the age to make a will, shall be disposed of [V. d. L. 1. 3. 4; Grot. 1. 5. 24; Voet 24. 3. 23].

Agreement not to change domicil.

In an antenuptial contract agreements or stipulations which are contrary to any prohibitory law, or to morals, or to the nature of marriage, are not valid. Among these should not be classed the stipulation that the husband may not change his domicil without the consent of his wife. Voet [5. 1. 101], however, is of a different opinion [V.d.K. 228].

Liability of wife for husband's debts.

The stipulation in an antenuptial contract against the liability of the wife for her husband's debts is always subject to the provision that she does not share in the profits made by the husband [Grot. 1. 5. 24].

Wife's right to profits.

Van der Keessel, however, lays down that an antenuptial contract may contain a stipulation that the wife should have a share in the profits, but should not be liable in the losses; and says that such a stipulation is, however, disapproved by Grotius and Neostadius [V. d. K. 249].

Right of wife to *separatio bonorum* and to interdict husband from alienating her property.

If a wife find during the marriage that her husband is likely to reduce her to poverty, she may claim a judicial *separatio bonorum*, and interdict her husband from the administration of her property; and if this interdict be publicly notified, the husband may not afterwards validly alienate or encumber her property or render her liable for his debts [Grot. 1. 5. 24].

Casual loss to property of either party.

Where by an antenuptial contract community of property only and not profit and loss has been excluded, an accidental or casual loss occurring to the property of either of the parties is not common to both, but attaches to the owner of such property. The same rule applies to necessary expenses of an extraordinary nature [V. d. K. 257].

Stipulation for legal mortgage over husband's property.

Where a wife stipulates in an antenuptial contract that her property should be reserved to her, she may also stipulate for a legal mortgage over her husband's property for loss caused by the husband. Indeed, it is believed that she has even a tacit mortgage in such a

case over the husband's property. This right of mortgage prevails even against those creditors of the husband who are prior in time [V. d. K. 247, 258].

Right of creditors over husband's estate.

The wife cannot claim under an antenuptial contract any benefit whatever or any compensation out of her husband's property before all the creditors are paid [Grot. 2. 13. 17].

Invalid provisions in antenuptial contract. Gifts to each other by husband and wife. Testamentary disposition in each other's favour.

A provision in an antenuptial contract which grants to either party permission to do that which the law prohibits, is not valid, *e.g.*, a provision that the parties may make gifts to each other. Likewise, a provision which prohibits that which the law permits is also invalid, *e.g.*, a provision to the effect that the parties are restrained from making testamentary dispositions in favour of each other [Voet 23. 4. 20].

Gifts *inter vivos* between husband and wife.

It may here be mentioned that husband and wife cannot, under the Roman Dutch Law, make gifts in favour of each other, although it is competent to one to make a disposition in favour of the other by testament. If, however, one spouse had given anything to the other, and persisted in the gift until death, the gift, in this case, partaking of the nature of a donation *mortis causa*, will have effect [V. L. 4. 24. 14; Voet 24. 1. 17].

Alienation of wife's dotal property.

A provision depriving the husband of a right which the law may have given him of alienating his wife's dotal property is valid, its object being not so much to abridge the marital authority as to afford adequate security to her property [Voet 23. 4. 21].

Communio bonorum and *communio quæstuum*, adoption of, by antenuptial contract.

It is also competent for the parties to adopt by an antenuptial contract the *communio bonorum* or the *communio quæstuum*, although neither of these provisions should be established by the law of the country in which they are domiciled, or to exclude both or either of these provisions, although they are established by that law. They may reject that which prevails in the country of their domicil, and select that which is adopted in some other country [Voet 23. 4. 27].

The *douarie* or *doarium* spoken of above is demandable only when the marriage is dissolved by death and not by divorce or separation [Voet 24. 3. 23]. The *douarie* or *doarium.*

If a particular house should be assigned as the *doarium*, and during the lifetime of either party it was burnt down by accident, and another house built, it seems the latter could not be claimed by the party entitled to the *doarium* without paying the expense incurred in rebuilding it [Voet 24. 3. 24]. The survivor, notwithstanding any specific property may have been assigned as the *doarium*, acquires no lien or legal mortgage on the property of the deceased as a security for it, but receives it after all the creditors of the deceased have been first satisfied [Voet 24. 3. 25]. Lien as security for *doarium.*

Whatever the parties by an antenuptial contract have stipulated in each other's favour cannot by any act during their lives, even with mutual consent, be afterwards revoked. Such revocation is good if made by last will. As to conditions concerning the succession to property, the better opinion is that they may be revoked by last will by both or either of the parties [V. d. L. 1. 3. 5]. Conditions in antenuptial contract irrevocable.

The validity of a marriage depends on the will and capacity of the persons to make it, and on its being made in the manner and with the solemnities required by law [*Cens. For*. 1. 1. 13. 6, 7; Brouw. 1. 17. 6. 7; V. d. L. 1. 3. 6]. Consent of parties to marriage and compliance with solemnities.

Those persons are incapable of entering into the contract of marriage who are already in the marriage state. In Ceylon, no marriage is valid where either of the parties thereto had contracted a prior marriage which has not been legally dissolved or declared void. Who incapable of entering into contract of marriage.

Every person who contracts a subsequent marriage before his or her prior marriage has been so dissolved or declared void, or marries another whom he or she knows to be bound by a previous marriage not so dissolved or declared void is guilty of bigamy, and Bigamy.

liable to imprisonment, simple or rigorous, for any period not exceeding three years, provided that no person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and has not been known by such person to be living within that time, is guilty of bigamy [Ord. No. 2 of 1895, sect. 19].

Among others who were incapable of entering into the contract of marriage were those who had not yet attained the full age of puberty, which in males was fourteen and in females twelve years. A widow whose husband had not been dead a sufficient time to determine to a certainty whether she was pregnant or not; and those who were of such mental incapacity as to render their consent to this contract insufficient, or who laboured under an incurable bodily infirmity or incapability to beget children, could not enter into this contract. Marriage was also prohibited between those who were too nearly related in blood or affinity. In the direct ascending and descending lines marriage was absolutely prohibited *in infinitum*, and in the collateral line, between persons of the second and third degree, consequently between brothers and sisters, uncles and nieces, aunts and nephews, and with respect to relations by affinity or marriage, this prohibition was equally extensive. Marriage was also not only forbidden between those who had previously lived in a state of adultery, but even punishable, and such marriages were not even permitted by dispensation. With respect to the marriage of parties who had eloped, there was a strong prohibition in Holland which, however, was afterwards much relaxed when the consent of parents was subsequently obtained. Also no guardian or curator might intermarry with his ward or the person placed under his care till after his accounts were passed and closed [V. d. L. 1. 3. 6].

In Ceylon, no marriage is valid to which the male party is under sixteen years of age or the female under twelve, or, if a daughter of European or Burgher parents, under fourteen years of age [Ord. No. 2 of 1895, sect. 16]. Under the Roman-Dutch Law, although persons under age could not contract a marriage, yet if either of them erroneously taken to have attained puberty had contracted a marriage in public form, it became valid upon his or her attaining puberty [V. d. K. 66]. Marriage of persons under age.

In the case of a marriage between persons who have lived in adultery, neither party can acquire any hereditary rights. The property that he or she would otherwise have acquired passes to the co-heirs, substitutes, or legitimate heirs [V. d. K. 70]. Indeed a man, after the death of his wife, cannot lawfully marry a woman with whom he had been living in adultery during the lifetime of his wife ; and children procreated in adultery do not, as more fully explained elsewhere, become legitimate by the subsequent marriage of their father and mother [*Karonchihami v. Angohami*, 2 N. L. R. 276 ; 3 C. L. R. 93]. Of those who have lived in adultery.

Under the later law of Holland a person guilty of the violent abduction of a virgin accompanied with rape was not permitted to marry his victim [V. d. K. 71]. Marriage with abducted female.

The prohibition against the marriage of a guardian with his ward applies also to the marriage of his son with the ward [V. d. K. 74]. Marriage with guardian's son.

As to the prohibited degrees of relationship under the Roman-Dutch Law, see further Grot. 1. 5. 5 *et seq.* Prohibited degrees.

With us, no marriage is valid where either party is directly descended from the other or where the female is sister of the male by the full or the half blood, or the daughter of his brother or of his sister by the full or the half blood, or a descendant from either of them, or daughter of his wife by another father or his son's or grandson's or father's or grandfather's widow, or where the male is brother of the female either by the Prohibited degrees in Ceylon.

full or the half blood, or the son of her brother or sister by the full or the half blood, or a descendant from either of them, or the son of her husband by another mother, or her deceased daughter's or grand-daughter's or mother's or grandmother's husband [Ord. No. 2 of 1895, sect. 17].

Incest.

Marriage or cohabitation between parties standing towards each other in any of these degrees of relationship is an offence punishable with imprisonment, simple or rigorous, for any period not exceeding one year [sect. 18].

Marriage with deceased wife's sister.

By the law of this Colony there is no objection to a man marrying his deceased wife's sister [*Valliammai v. Annammai*, 4 N. L. R. 8].

When lunatic may contract marriage.

A lunatic or insane person may contract a valid marriage during a lucid interval [1. B. 138].

Physical impossibility of consummating marriage.

The physical impossibility of consummating the marriage or impotency is an impediment which strictly speaking renders the marriage voidable and not *ipso facto* void. The marriage remains, therefore, valid until it is set aside in the lifetime of the parties [1. B. 139]. A person contracting a marriage with knowledge of his impotency cannot annul his contract [*Ibid.*].

Marriage under influence of fraud, &c.

The will or consent of the parties is the very essence of the contract. Hence, a marriage which takes place under the influence of fraud, force, or fear is *ipso facto* void; but the subsequent voluntary cohabitation of persons when the fear or force no longer exists will give validity to the marriage [*Cens. For.* 1. 1. 13. 6, 7; Brouw. 1. 17. 6. 7]. There is also an absence of will or consent when either party marries under the influence of error or mistake, *circa substantia,* as in respect of the person or sex, but not when it regards the name, fortune, or personal qualities [1 B. 137].

Error or mistake.

Want of age.

Although the want of age avoids the marriage, cohabitation after the attainment of the age of puberty renders the marriage valid *ab initio* [1 B. 140].

Consanguinity an impediment.

Under the Roman-Dutch Law, as under the Roman Law, consanguinity or affinity is not the less an impediment because the kindred are illegitimate [Voet 23. 2. 35; Dig. 23. 2. 54].

Second marriage owing to absence of husband.

Under an Edict of the States-General, dated 18th March, 1566, where a husband had been absent from his wife during an entire interval of five years, and the wife had received no intelligence, and there was no evidence of the husband being alive, the Court might take cognizance of the case, and by its decree permit the wife to marry again [1. B. 151].

Validity of marriage and status of parties by what law to be decided.

The question whether a valid marriage has been contracted is to be referred to the exclusive decision of the law of the place where the marriage is celebrated. But there is difference of opinion as to the extent to which that law should prevail in deciding on the rights and capacities incident to the status [1 B. 184. See *Scrimshire v. Scrimshire*, 2 Hagg. Cons. Rep. 417, 118 and Voet 23. 2. 4]. This principle is applied to all questions involving the validity of the marriage, whether they respect the competence of the parties to contract or the manner in which they have contracted marriage. The exceptions to which it is subject are few.

When *lex loci contractus* is not to be given effect to.

A State would not give effect to the *lex loci contractus* if it sanctioned a violation of the precepts of the Christian religion or of public morals or of its own policy and institutions.

Marriage founded on polygamy.

A marriage founded on polygamy or which was incestuous would not be recognised in any Christian country, although it might be warranted by the Municipal Law of the country in which it was contracted [1 B. 188].

Marriage between relatives in the ascending and descending lines.

This exception is at once admitted when the marriage has been contracted between parties related to each other within those degrees which all Codes concur in treating as prohibited, as marriages between relatives by blood in the ascending or descending line and between brother and sister by blood, because marriages

between those parties are universally regarded as incestuous and void [Grot. de Jur. Bel. et Pac. 2. 5. 12–14]. But there is a great difficulty in determining when the prohibition of marriages between persons related in the collateral line in any degree beyond that of brother and sister can be sustained on the ground of their repugnancy to the law of nature. Burge [1 B. 189] cites an American case [*Greenwood v. Curtis*, 6 Mass. R. 378, 379] on this subject, in which the following opinion was expressed :—" If a foreign State allows a marriage incestuous by the laws of nature, as between parent and child, such marriage would not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States, such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract." This doctrine, says Burge, if it be confined to cases in which the party had acquired a *bonâ fide* domicil in the country which sanctions a marriage prohibited by the law of his former domicil, may be readily admitted. It ought not, however, to be extended to a case in which the party retains his domicil in the country where the prohibitory law prevails, but quits it and resorts to another country for the single purpose of evading that law, and of doing that which the law of the latter country permits, or rather does not prohibit [see Huber 1. 3. 8 ; 1 B. 190].

Marriages prohibited in one country how far valid in another.

Change of domicil for purpose of marriage.

English decisions seem to have established the rule that a foreign marriage, valid according to the law of the place where it is celebrated, is good everywhere else, but they have not established, conversely, that marriages of British subjects, not good according to

Marriages valid according to the *loci contractus*.

the general law of the place where celebrated, are universally and under all possible circumstances to be regarded as invalid in England. "It is therefore," says Lord Stowell, "to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of England does not say that its subjects shall not marry abroad" [*Ruding v. Smith*, 2 Hagg. Con. Rep. 371].

Forms and essentials of contract of marriage.

The forms of entering into a contract of marriage depend upon the *lex loci contractus*,—the essentials upon the *lex domicilii*. Where both parties are, at the time of an alleged marriage, domiciled in the same country, their personal capacity to contract a marriage is determined by the law of that country. But where a marriage is celebrated in England between parties who, according to the law of England, are not subject to any legal incapacity to marry, and one of whom is, at the time of the marriage, domiciled in England, the marriage will not be annulled in an English Court on the ground of an incapacity imposed by the law of the country where the other party was domiciled at the time of the marriage [*Brook v. Brook*, 8 H. L. C. 193; *Sottomayor v. De Barros*, 47 L. J. P. 23; 5 C. R. C. 783].

Marriage under law which permits polygamy.

A contract uniting a man and woman under a law which permits either of the parties, without the dissolution of that union, to enter into a similar contract with another, cannot in an English Court be recognised as a marriage. But a marriage, contracted on the basis of an exclusive union, in a country—though a non-Christian country—where the law regards marriage as an exclusive union, is held in England to be valid; provided it was celebrated according to the laws and customs of the country where it was contracted [*Hyde v. Hyde*, L. R. I. P. & D. 130; *Brinkley v. Attorney-General*, 15 P. D. 76; 5 C. R. C. 833.

Summary of law as to validity of marriages contracted according to laws of certain countries.

The result of the opinions of jurists and the decisions of judicial tribunals are thus summarised by Burge—(1) That the validity of the marriage both in respect of the competence of the parties to contract and of the solemnities with which they contract it is to be decided with reference to the law of the place in which the marriage is contracted, and that if it be valid *secundum legem loci contractus*, it must be deemed valid in every other place. (2) But the *lex loci contractus* is not admitted when it violates the law of nature, public morals, or the policy or institutions of that State in which its validity is sought to be established. (3) It is not admitted when the parties have no *bonâ fide* domicil *in loco contractus*, but have resorted thither to evade a prohibitory law in force in the place of their actual domicil extending to marriages contracted in any other country in terms or in effect, and which law has made void a marriage contracted in contravention of its provisions. (4) The parties are excused from conforming to the *lex loci contractus* if they belong to a State the subjects of which form a separate and distinct community in the foreign country in which they are married, as in the case of the British factories established in various parts of Europe and Asia, or if they belong to the State which has taken hostile possession and is in the occupation of the foreign country, or if they belong to the State whose ambassador is established in the foreign country. In these instances, the parties may celebrate their marriage according to the law of their own country [1 B. 199].

When *lex loci contractus* is not admitted.

Consent of parents.

In the case of young men under twenty-five years and maidens under twenty, if the parents of the parties who wish to intermarry are alive, their consent must be previously obtained. By "parents" is understood father and mother, and by no means grandfather or grandmother, much less any remoter relations in the ascending or collateral line. The consent of guardians

was not under the Roman-Dutch Law necessary, except in compliance with the provisions of some special local law. Even in the case of persons above the respective ages mentioned above the parents were summoned by the proper authority to show cause against the marriage. Cause was mostly founded upon some public bad conduct of one of the parties [V. d. L. 1. 3. 6].

Marriage with consent of parents, &c.

Marriages contracted by minors without the consent of their parents or guardians were, however, not absolutely void. They were considered dishonourable, and the offenders were liable to punishment. [Grot. 1. 5. 14]. Van Leeuwen thinks that a secret marriage without the knowledge of the parents is invalid, and may be annulled by them, and declared to be no marriage at all [V. L. 1. 14. 6].

Whose consent necessary in Ceylon.

In Ceylon, the father of any person under twenty-one years of age not being a widow or widower, or if the father is dead or under legal incapacity or in parts beyond the Island and unable to make known his will, the mother, or, if both father and mother be dead, or under legal incapacity, or in parts beyond the Island and unable to make known their will, the guardian or guardians appointed over the party so under age by the father or mother of such party or by a competent Court have authority to give consent to the marriage of such party, and such consent is required for the marriage. If there is no person authorised as aforesaid to give consent, or if the person so authorised unreasonably withholds or refuses his or her consent, the Judge of the District Court within whose jurisdiction the party so under age resides may, upon the application of any party interested in the marriage and after summary inquiry, give consent to the marriage, and such consent is required for such marriage [Ord. No. 2 of 1895, sect. 23].

Whoever marries a young man or young woman without the necessary consent cannot by antenuptial

contract stipulate for any benefit from the property of such spouse [Grot. 2. 12. 7].

Voet lays down that the marriage of males under the age of twenty-five and of females under the age of twenty years was invalid except with the previous consent of their parents, or if both parents are dead, of their nearest relations [Voet 23. 2. 11, 12]. The consent of both the father and mother is required, but if they should disagree, then that of the father will prevail in opposition to the dissent of the mother [Voet 23. 2. 13]. The consent of the parents given subsequently to the marriage will, by the law of Holland, render the marriage valid *ab initio*, although by the Edict of Charles V., 4th October, 1540, Art. 17, a husband or wife who has prevailed on the minor to marry without the latter having previously obtained the consent of his or her parent or guardian can derive no benefit from that minor's property [Voet 23. 2. 19].

Solemnities.

As to the solemnities to be observed under the Dutch Law in celebrating the act of marriage see V. d. L. 1. 3. 6. A marriage wherein the solemnities therein prescribed are not observed is null and void [*Ibid.*].

Formalities to be observed in Ceylon.

Notice of marriage.

In Ceylon, Ordinance No. 2 of 1895 [amended by Ordinance No. 19 of 1900] consolidates and amends the laws relating to the registration of marriages other than marriages of Kandyans and of Mohammedans. If both parties have been resident in the Island for ten days, one of the parties should give notice to the Registrar of the division in which both parties have dwelt for not less than ten days then next preceding. If the parties have dwelt in different divisions, then each party should give notice to the Registrar of the division in which he or she has dwelt for not less than ten days next preceding the giving of such notice. If one of the parties has not been resident in the Island for ten days next immediately preceding the giving of notice, then

notice should be given by the other party who has been so resident to the Registrar, Assistant Provincial Registrar, or Provincial Registrar in whose division, district, part of a province, or province he has been resident ten days then next preceding, and such notice is sufficient notice of the intended marriage. If both parties have been resident for not less than ten days in the same province, notice given by one party to the Provincial Registrar is sufficient, and if both parties have been resident for not less than ten days in the same district or part of a province, then notice given by one party to the Assistant Provincial Registrar is sufficient [sect. 24].

Form of notice.

The notice should be in the form D in the second schedule to the Ordinance, and should state the names in full, and the age, profession, and condition of each of the parties, and the dwelling-place of the party giving notice and of the other party, if known, and, if the case be so, that the other party is absent from the Island or has not resided for ten days in any part of the Island, and should bear on its face the written consent of any person whose consent is required by law [sect. 25]. The party giving the notice should make and sign or subscribe a declaration in writing in the body or at the foot of the notice that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the marriage, and that he or she has for the space of ten days immediately preceding the giving of notice dwelt within the division of the Registrar to whom the notice is given, and that the consent of the person whose consent is required by law has been given and embodied in the notice [sect. 25].

How notice is to be signed.

The notice and declaration should be signed and subscribed by the party giving or making the same in the presence of the Registrar of the division or a Minister or a Justice of the Peace or a Notary and of

two credible witnesses who should attest the same by adding each his name, description, and place of abode. The Registrar, Minister, Justice of the Peace, Notary, or both the witnesses should be personally acquainted with either or both of the parties. The notice should bear a stamp of ten rupees [sect. 25].

Certificate to be issued by Registrar.

At any time not less than twelve days [except as provided in section 28] nor more than three months [except as provided in section 31] from the entry of the notice in the register, the Registrar, or where notice has been given to two Registrars, each of them is bound, upon application of the party who has given notice, and on receipt of the certified copy of the notice, if any, given to the other Registrar, to issue a certificate in the form F in the second schedule to the Ordinance, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the Registrar, and provided that the issuing of such certificate has not been forbidden or a caveat entered as provided by the Ordinance. The certificate should state the particulars set forth in the notice and the day on which it was entered, and that its issue has not been forbidden by any person lawfully empowered to do so, and that the full period of twelve days has elapsed since the entry of the notice, or, where two notices have been given, since the entry of both notices [sect. 27. See sect. 8 of Ord. No. 19 of 1900].

Special license before the prescribed period.

The Registrar-General, the Provincial Registrar of the Province, or the Assistant Provincial Registrar of the District within which notice has been given may, however, upon the production of a certified copy of such notice, issue, at any time after the entry of the notice, a license under his hand substantially in the form G in the second schedule to the Ordinance, authorising the Registrar to whom notice has been given to issue his certificate, provided that in the meantime no lawful impediment to the issuing of such

certificate has been shown to the satisfaction of the Registrar-General or Provincial Registrar or Assistant Provincial Registrar, and provided that the issue of the certificate has not been forbidden or a caveat entered as provided by the Ordinance. Where the parties have given, under section 24, notice to two Registrars, then the Registrar-General, the Provincial Registrar, or the Assistant Provincial Registrar within whose local jurisdiction are situated the divisions of both the Registrars to whom notices have been given may, upon the production of a certified copy of each notice, issue a license to each of the Registrars. The license should be substantially in form H in the second schedule to the Ordinance [sect. 28. See sect. 9 of Ord. No. 19 of 1900].

Declaration to be made for special license.

Before the issue of the license referred to above, one of the parties to the intended marriage should appear personally before the Registrar-General or Provincial Registrar or Assistant Provincial Registrar, and make and subscribe a declaration that he or she believes that there is no impediment of kindred or alliance, or of any other lawful cause or other lawful hindrance to the marriage, and that the consent of any person whose consent is required has been obtained, and that the issue of the certificate has not been forbidden, nor any caveat entered, nor any suit pending in any Court to bar or hinder the marriage. This declaration should bear a stamp of thirty rupees. The Registrar to whom the license is issued should, upon its receipt, issue his certificate, stating therein the particulars set forth in the notice and the day on which it was entered, and that the issue of the certificate has been authorised by the license of the Registrar-General or of the Provincial Registrar, as the case may be [sect. 28, sub-sects. 3 and 4].

Who may forbid issue of certificate.

Every person whose consent to a marriage is required by law may forbid the issue of the Registrar's certificate

by signing and subscribing in the presence of the Registrar and of two credible witnesses, who should be personally acquainted with the person forbidding and be known to the Registrar or be resident within his jurisdiction, and by delivering to him, a notice in writing in the form I in the second schedule to the Ordinance with his or her name, place of abode, and relationship to the party whose marriage is forbidden entered therein [sect. 29].

Caveat.

Any person may at any time before the issue of the certificate enter a caveat against its issue. The caveat should be in the form J in the second schedule to the Ordinance. It should contain a statement of the name and residence of the caveator, the names and residences of the parties to whose marriage he objects, and the grounds of his objection. It should bear a stamp of ten rupees, and be signed in the presence of the Registrar and two credible witnesses, who must be personally acquainted with the caveator, and be known to the Registrar or be resident within his jurisdiction; and should be delivered to the Registrar [sect. 30].

Registrar's duty when caveat is entered.

If a marriage is forbidden or a caveat is entered, the Registrar should refuse to issue a certificate, and should forthwith make report to the District Judge of the district within which his division is situated. The report should be in the form K in the schedule to the Ordinance, and contain a copy of the notice of marriage and of the notice forbidding the marriage or of the caveat entered. The District Judge should thereon proceed to make summary inquiry into the grounds of objection [the person forbidding the marriage or entering the caveat being respondent] and order the certificate to issue or not, as to him may appear just. If in the course of the inquiry it be proved to his satisfaction that the marriage was forbidden or the caveat was entered on frivolous or vexatious grounds, he may impose on the offender a fine not exceeding one thousand

Inquiry by District Judge.

rupees. The order of the Judge is subject to appeal to the Supreme Court, and all proceedings in the District and the Supreme Court are exempt from stamp duty. A copy of the order of the District Court or of the Supreme Court in appeal certified under the hand of the District Judge should be forwarded by him to the Registrar, who should thereon issue or refuse to issue the certificate as the order directs. The time taken up in disposing of the objection should not be taken into account in the calculation of the period of three months under section 27 or under section 37 [sect. 31].

Marriage to be solemnised on production of certificate.

On the production of the certificate of the Registrar, or where notice has been given to two Registrars, on the production of a certificate from each of the Registrars, to a Minister or to a Registrar, to whom either or both of the parties may have given notice, a marriage may be solemnised between the parties by the Minister in a registered place of worship, or other authorised place, or by the Registrar in his office, station, or other authorised place, provided there be no lawful impediment to the marriage [sect. 32. See sect. 11 of Ord. No. 19 of 1900].

Solemnisation at place and hour other than that fixed by Ordinance.

Where the female party to an intended marriage belongs to a class of people to whose habits and feelings it is contrary to require females to appear in public before wedlock, the Registrar-General or Provincial Registrar or Assistant Provincial Registrar may issue a license empowering a Registrar to solemnise the marriage of such female at such place and hour as the parties may prefer and as may be named in the license, provided that the requirements of the Ordinance in all other respects than the place and hour of marriage are fully complied with [sect. 36 (1)].

If the female party does not belong to the class of people mentioned above, the Registrar-General, the Provincial Registrar, or the Assistant Provincial Registrar upon the application, bearing a stamp of fifty

rupees, of one of the parties, may issue a license empowering a Registrar to solemnise the marriage at such place and hour as the parties may prefer and as may be named in the license, provided that in every other respect the requirements of the Ordinance are fully complied with [sect. 30 (2)].

The Registrar-General, the Provincial Registrar of the Province, or the Assistant Provincial Registrar of the district within which a marriage is to be solemnised may likewise, upon the application of one of the parties or by the minister by whom the marriage is intended to be solemnised, issue a license to such minister empowering him to solemnise the marriage at such place specified in such license other than a registered place of worship and at such hour as the parties may prefer, provided that in every other respect the requirements of the Ordinance are fully complied with [sect. 35 (3)]. Except on a license under this section, a marriage should be solemnised between the hours of six in the morning and six in the afternoon [sects. 33 and 34].

Time when, usually, marriage is to be solemnised.

Deathbed marriages.

A minister may solemnise, without the preliminaries required by the Ordinance, at any convenient place, a marriage between parties of whom one is believed to be on the point of death, provided that such person is of sound mind, memory, and understanding, and provided that the minister enters immediately a statement of the particulars of the marriage in his book, and makes a certificate at the foot of such entry, signed by himself and the witnesses, substantially in the form given in the Ordinance [sect. 38].

Evidence of marriage.

The entry made by the Registrar in his marriage register book under sections 33, 34, and 38 of the Ordinance constitutes the registration of the marriage, and is the best evidence thereof before all Courts and in all proceedings in which it may be necessary to give evidence of the marriage. And after any marriage is

registered, it is not necessary to give in support of such marriage any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the division stated in the notice, or of the consent of any person whose consent was required by law, or that the place or hour of marriage was that required by the law, nor could evidence be given to prove the contrary in any suit or legal proceeding touching the validity of such marriage [sect. 40].

Certified copies or extracts of or from entries in books or documents kept under this Ordinance purporting to be made under the hand of the Registrar-General, or of his Assistant, or of the Provincial Registrar, or of the Assistant Provincial Registrar, or if purporting to be made under the hand of the Registrar and countersigned by the Registrar-General, Provincial Registrar, or Assistant Provincial Registrar, are to be received as *primâ facie* evidence of the matter to which they relate without any further or other proof of such entries [sect. 49]. Certified copies and extracts from register.

If both parties to a marriage knowingly and wilfully intermarry under the provisions of the Ordinance in any place other than that prescribed by the Ordinance, or under a false name or names, or, except in cases of deathbed marriages, without a certificate of notice duly issued, or wilfully consent to or acquiesce in the solemnisation of the marriage by a person who is not authorised to solemnise the marriage, the marriage of such parties will be null and void [sect. 43]. Where parties knowingly violate provisions of Ordinance.

If any valid marriage is contracted under the Ordinance by means of a wilfully false notice, certificate, or declaration made by either party, the District Court may, upon the application of either party, or, if the marriage has been contracted without the consent of the person whose consent is required by law, then, upon the application of such person or of the Attorney-General, and after due inquiry, may order and direct that all Registration induced by dishonest act of one party.

estate and interest in any property accruing to the offending party by the force of the marriage be forfeited, and be secured under the direction of the Court for the benefit of the innocent party or of the issue of the marriage or of any of them, in such manner as the Court may think fit for the purpose of preventing the offending party from deriving any interest in any real or personal estate or pecuniary benefit from such marriage. If both the contracting parties be guilty of any such offence as aforesaid, then the Court may settle and secure the property or any part thereof immediately for the benefit of the issue of the marriage, subject to such provision for the offending party or parties by way of maintenance or otherwise as the Court may think fit. The order of the District Court under this section is subject to appeal [sect. 44]. Agreements, settlements, and deeds entered into by the parties in contemplation of, or before or after or in relation to, such marriage are absolutely void, and have no force or effect so far as the same are inconsistent with the provisions of the security and settlement made by the Court as aforesaid [sect. 45].

Settlements inconsistent with order of Court void.

Further provisions of Ordinance.

The Ordinance further makes provision for the correction of errors in the registers, the preservation of the different books and documents kept under it, and for such other purposes.

Registration not essential to validity of marriage.

Section 15 of Ordinance No. 2 of 1895 enacted that no marriage contracted after the Ordinance came into operation should be valid unless it was duly solemnised by a Minister or a Registrar, and was registered in manner and form prescribed by the Ordinance, provided that nothing therein contained should be construed to render invalid, merely by reason of its not having been registered, any marriage between persons professing the Hindu religion not domiciled in the Island, or to preclude any legal evidence other than that of registration from being adduced in proof of such marriage.

This section was, however, wholly repealed by Ordinance No. 10 of 1896; so that, as held in *Babina v. Dingy* [5 S. C. C. 9] with regard to marriages falling under the purview of the repealed Ordinance No. 13 of 1863, it would appear that registration is not essential to the validity of marriages falling under the purview of Ordinance No. 2 of 1895. In *Valliammai v. Annammai* [4 N. L. R. 8], in *De Silva v. Shaik Ali* [1 N. L. R. 228], and in *Mirando v. Nagamuttu* [3 Br. 45], which dealt with marriages contracted before the Ordinance of 1895, it was held that registration was not necessary to constitute a valid marriage.

When marriage is considered completed.

Marriage is considered as completed as soon as it has been celebrated with the prescribed solemnities, so that all rights arising out of marriage vest and take effect at once, although no sexual intercourse follows [Grot. 1. 5. 17].

A marriage consummated with religious formalities, says Van Leeuwen in the *Censura Forensis,* is legal, although no intercourse follows. Neostadius, he says, reports a decision to that effect of the Supreme Court of Holland, where a couple who had been united in marriage in open church were drowned in a lake which lay in their homeward way before the procreative marriage rite had taken place [*Cens. For.* 1. 1. 3. 7].

Marriage in ambassadors' chapels.

The statute 4 Geo. IV. c. 91 provided for the solemnisation of marriages in the chapels of British ambassadors and certain other places in parts beyond the seas. A marriage of foreigners in an ambassador's chapel without the banns or license is null where neither party is of the country or suit of that ambassador [*Petreis v. Tondear*, 1 Hagg. Cons. Rep. 136].

Of military men.

In the case of a military force stationed in a conquered country merely for the purpose of enforcing the obedience of the natives, its members may contract marriages according to the law of their own country.

The same principle would be applied to the condition of a garrison of a subdued country [*Burn v. Farrar*, 2 Hagg. Cons. Rep. 269 ; *Ruding v. Smith*, 2 Hagg. Cons. Rep. 371]. There are decisions of English Courts showing that marriage may also be constituted by the parties living openly together in the character of man and wife, or, in the language of the law of Scotland, being in "habit and repute" as man and wife [1 B. 173]. A distinction, however, has been made between cases where the parties have been reputedly married from the first, and those in which the connection has begun illicitly. In the former, the reputed cohabitation is sufficient; in the latter, the presumption is that the parties continue to cohabit illicitly, and it is necessary to prove, in some other way, that they really regarded each other as man and wife [1 B. 173]. Although cohabitation as man and wife be a proof of marriage, yet even where the parties live avowedly in that relation, it is competent to prove that they never intended marriage, but merely assumed that character to save appearances. The proof of this in such circumstances must be strong and almost conclusive [1 B. 174]. Under the Roman-Dutch Law also there is a presumption in favour of marriage rather than of concubinage. In Ceylon, as in England, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. Where it is proved that they had gone through a form of marriage, and thereby shown an intention to be married, those who claim any right or advantage by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed [*Valaider v. Sembecutty*, 2 N. L. R. 322 ; 50 L. J. P. C. 28 ; 6 App. Cas. 364. See also *Valliammai v. Annammai*, 4 N. L. R. 8 ; 1 Br. 29 ; and *Tisselhamy v. Nonohamy*, 2 N. L. R. 352].

Marriage in "habit and repute."

Presumption from cohabitation.

Presumption from cohabitation and reputation.

As to the consequences of marriage lawfully contracted, so far as they are not avoided by an antenuptial contract, they have relation either to the person or the goods of the parties. The personal consequences of marriage consist principally in the marital power, or the power of the husband over the wife. The wife becomes by marriage, as it were, a minor; and the husband, her curator or guardian. She has no power to appear in Court, and she is not capable of herself to enter into any contract without the knowledge or consent of her husband, so as to bind her to others, except so far as she may clearly appear thereby to have derived an advantage or profit, unless she, with the knowledge of her husband, has carried on trade openly. On the other hand, the wife is bound and liable for all debts and engagements contracted by her husband even without her knowledge, and equally with him during the marriage, and after his death for one-half thereof, unless the obligation arises from some crime on the husband's part. The husband may further at his pleasure alienate or encumber the wife's property without her consent thereto. If, however, he makes such a manifest misuse of the marital power as is likely to bring the wife to poverty, the law affords her the means of checking him. The most usual step in such a case, under the Dutch Law, was a petition that the husband's person and property might be placed under curatorship [V. d. L. 1. 3. 7; Voet 23. 2. 52].

Consequence of marriage.

Marital power of husband.

Wife cannot contract, and has no power to appear in Court.

Misuse of marital power.

A pecuniary penalty imposed by judicial sentence for a crime committed by the husband must be borne by his estate alone, and is not chargeable against that of the wife. If he committed an offence which subjected his property to confiscation, the wife's interest in the property of the community would not be affected. If there existed a general community, the Fisc would take only the husband's moiety; and if there was the *communio quæstuum*, it would take the

Penalty for crime by husband.

husband's moiety only of the acquisitions [Groen. *ad C. tit. Ne uxor pro marito*, n. 3 ; Roden. tit. 2 Conjug. Obliq. Delinq. n. 3]. A pecuniary penalty in which the wife is condemned may be enforced by execution *stante matrimonio*, although the husband will thereby suffer for an offence of which he is innocent [Roden. Conjug. Obliq. Delinq. 2. 5]. The husband is, however, indemnified on the termination of the community by obtaining repayment from the wife's property [*Ibid.*].

Pecuniary penalty in which wife is condemned.

Husband appears for wife in Court, and may encumber her property.

The husband appears for his wife in Court, and he may alienate and encumber even property that the wife has kept out of the community at his pleasure and without requiring her consent. The wife may be sued for half the liabilities of the husband even after his death [Grot. 1. 5. 22].

The power of the husband to appear for his wife in Court cannot be removed even by antenuptial contract. A judgment against a wife litigating without her husband is as null and void as a judgment against an undefended minor. The fact that the husband has come under the operation of the law as to *cessio bonorum* makes no difference. Even where there has been a *separatio bonorum* may a husband represent his wife in Court, unless the separation be by order of Court after due hearing [Voet 5. 1. 14]. But where a husband maliciously or fraudulently refuses to defend or take action on behalf of his wife, she may do so upon the authority of the Judge, even where the action is for slander or such other injury done to her [Voet, 5. 1. 18]. If, however, a woman, contrary to the prohibition of law, appear in a judicial proceeding and succeed therein, the judgment pronounced in her favour will be held good [Voet 5. 1. 19].

When wife may appear in Court.

Wife carrying on trade openly.

The wife may appear in Court when authorised by her husband. She may not alienate or encumber her husband's property or her own. In the case of a married woman carrying on trade or business openly, it is only

matters connected with such trade or business that she can validly transact. She may in those matters bind herself and her husband, and sell and encumber the stock of the business. The trade or business here referred to must be the exclusive concern of the wife. Thus, it has been held that a woman living with her husband in a house where she kept a "hopper boutique," and sold hoppers, plantains, cigars, betel leaves, &c., is not to be deemed a *publica mercatrix* without some evidence that she was carrying on that trade independently of her husband; and to render a married woman liable on a promissory note made by her without the consent or knowledge of her husband, it must be proved not only that she is a *publica mercatrix*, but that the obligation was incurred *mercaturæ intuitu* [*Somasunderam v. Banda*, 6 N. L. R. 253].

Wife may bind husband in matters of household management.

How husband can prevent liability.

Women may, generally speaking, transact business connected with the household, and may to that extent bind themselves and their husbands. The husband cannot prevent this unless he interdicts his wife judicially from the management, and give public notice of the same. In any case, however, the husband will be liable to even a greater extent than is stated above, in so far as he has profited by his wife's dealings [Grot. 1. 5. 23; Voet 23. 2. 44; 3 Lor. 207].

Reason for liability of husband for debts incurred by wife.

The liability of a husband for debts incurred by the wife is based upon the ordinary principles of agency. The husband is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorised her to pledge his credit, or has so conducted himself as to have held out that she had his authority, or represented her as having such authority, and is thus estopped from denying such authority. In the case of a dealing with a tradesman for the first time, there can be no such holding out; and the fact that the husband had made his wife a sufficient allowance to supply herself and her children with clothes,

and forbidden her to exceed it, is sufficient to negative any implied authority to pledge his credit for clothes ordered by her, although they might be necessary [*Jolly v. Rees*, 33 L. J. C. P. 177; *Debenham v. Mellon*, 49 L. J. Q. B. 497; 2 C. R. C. 437].

Whether wife separated from husband can claim maintenance.

It is, however, doubtful that a wife living separate from her husband without having obtained a decree of divorce or judicial separation can claim from her husband either expenses incurred by others in her maintenance or permanent future alimony [Ram. 77, 331]. A wife who lives apart from her husband by mutual consent cannot validly alienate property belonging to the marriage community. If, however, the husband knew of the sale by his wife, and raised no objection to its completion, he would probably be estopped from denying its validity, and where the wife sells without the knowledge of her husband, but for value, the purchaser would get title as against her own heirs [*De Silva v. Shaik Ali* 1, N. L. R. 228].

Alienation of property by her.

Husband's promise to pay for articles not necessaries.

Where articles which were not necessaries were supplied to the wife, the husband was held liable on his subsequent promise to pay [Gren. 1873, Pt. II. 56].

Agreement to relieve husband of liability to maintain.

An agreement entered into between a husband and wife that the wife should relieve the husband of the burden of maintaining her and their children is invalid [*Madumahami v. Kalu Appu*, 3 S. C. C. 132].

Injuries occasioned by wife.

The husband is probably liable even for any injury occasioned by his wife to a third person not amounting to a serious crime at all events to the extent of the wife's half of the joint property or of any dowry which he once had received with her [*Allisa v. Sendia*, 1 Tamb. 31].

Wife may make last will.

A married woman may by last will dispose of her property as she pleases without requiring the consent of her husband [Grot. 1. 5. 25].

When marital power ceases.

The husband's guardianship ceases when the marriage is dissolved, and when he himself falls into such a state

as to require to be placed under guardianship [Grot. 1. 5. 26, 27].

Wife cannot be arrested for debt.

Married women, as they have not the capacity to appear in Court, cannot be arrested for debt. It is doubtful whether a married woman who is a public merchant cannot be arrested for a debt contracted by her as such. The authorities seem to incline to the position that if her husband is present where she trades, she cannot be arrested, although he must then be summoned, and may be arrested for her debt, as a married woman cannot be a public trader if her husband dissents. But if her husband is absent, and she trades publicly, say beyond his domicil then she may be arrested [Voet 2. 4. 36].

Freedom of women from arrest in execution

No warrant under our Civil Procedure Code can, however, be issued for the arrest or imprisonment of a woman in execution of a decree for money [sect. 298].

Husband, though a minor, becomes guardian of wife.

The husband by marriage becomes the curator or guardian of his wife, notwithstanding that he may himself be a minor, that is, under the legal age of majority [Groen. ad D. l. 23. tit. 3; ad C. l. 3. tit. 13].

Wife may bind husband by contract with his authority.

The wife might with the authority of her husband bind herself and her husband by her contracts. Without this authority the contracts were *ipso facto* null and void, and gave no right of action against her even after the dissolution of the marriage [Voet 23. 2. 42; *Cens. For*. l. 1. 7. 6, 7].

Where husband is benefited by wife's contract.

If, as observed above, by the wife's contract both she and her husband are benefited, then neither party can dispute liability on the ground of the absence of the husband's authority [Voet 23. 2. 42; Grot. 1. 5. 38].

Wife may enforce contract with her after husband's death.

The exception that the contract was made without the husband's authority is competent only to him and his wife and their heirs. The wife, after the death of the husband, might enforce the performance of a contract made with her during his lifetime which he had not at any time disputed [1 B. 224].

When a person becomes bound to pay a sum of money to the wife without the husband's knowledge, he cannot discharge himself by a payment to the wife alone, unless he can prove it *in rem mariti esse versum* [1 B. 224].

Wife cannot appear in Court.

The wife had no *persona standi in judicio* either in her own right or *en outre droit.* She could not institute or defend an action even as a guardian or executrix, and a judgment obtained against her would be perfectly null and void [Voet. 5. 1. 14]. The Court, however, supplied the requisite authority if it was withheld by the husband, or could not be obtained in consequence of his absence or insanity or of the separation of him and his wife from each other [Voet. 1. 5. 16; Wendt 211].

When she is allowed to do so.

Wife may sue when she carries on trade.

If, however, the wife carries on a trade on her own behalf, as already explained, she can sue for the price of goods sold and delivered by her in the course of such trade without making her husband a party to the action [*Fernando v. Jacolis*, 2 S. C. C. 204]. Ordinarily, the husband is the proper party to sue and be sued. He must, at least, be associated with his wife in all actions, and this requirement of the law was insisted upon by the Supreme Court even when the statutory law allowed the wife to maintain or defend certain actions in her own name. Section 20 [since repealed] of "The Matrimonial Rights and Inheritance Ordinance, 1876," provided that a married woman might maintain or defend in her own name any action or other legal proceeding in respect of any property belonging to her as her separate property, but in *Fernando v. Felsinger* [6 S. C. C. 34] the Supreme Court held that this provision of the Ordinance was not to be read as dispensing with either the necessity or propriety of the practice of joining the husband as party defendant in the first instance, which prevailed both under the English and the Roman-Dutch Common Law. Where,

Right of wife to sue under Ordinance No.15 of 1876.

however, the wife's interests in an action are adverse to those of her husband, and he declines to associate with her in defending the action, she might give a proxy to a proctor and defend the action on her own account [*Manual v. Anohamy*, 1 Tamb. 2]. Where after a divorce between husband and wife, the wife was sued in respect of a cause of action that had accrued before the divorce, the Supreme Court thought that the husband should be joined in the action as a co-defendant [Vand. C. R. 128]. The husband, on the other hand, is not obliged to join his wife even in suits respecting land that belonged to his wife, and in which he had acquired an interest merely by operation of the law as to community of property [*De Silva v. Ondaatjee*, 1 S. C. R. 19].

Where wife's interests are adverse to those of her husband.

Cause of action before divorce.

Suits respecting lands subject of community.

The authority of the husband for the use of his name by his wife may be implied; and his subsequent ratification will render the proceedings valid, although his consent was wanting when they were commenced [Voet 5. 1. 16]. Even a contract void for want of the authority of the husband will be rendered valid by subsequent ratification [Voet 23. 2. 42].

The fact that the wife is below the legal age of majority does not render her incapable of making a binding contract in relation to any particular trade which she may be publicly carrying on [Voet 23. 2. 44]. She may be a surety or even pledge the real property in case these acts are strictly necessary in the conduct, and consistent with the purposes, of the trade [1 B. 226]. Her contracts in relation to the domestic establishment must be such as are warranted by the station and circumstances of her husband; otherwise they are invalid [1 B. 226]. She may even borrow money for the purpose of herself purchasing such necessaries as are required [Voet 23. 2. 46].

When wife carries on trade.

Her contracts in relation to domestic establishment.

Under the Civil Law a female, whether sole or married, was incapable of contracting an obligation as

Female could not be

surety under Civil Law.

surety for another. Such an obligation was void. This was the effect of the *Senatus Consultum Velleianum.* If any suit were brought to enforce it, she might by exception successfully resist it. It was, however, competent for her to renounce the benefit of this exception, and its renunciation was generally obtained from her by those who took the security [Dig. 16. 1; Cod. 4. 29; Voet 16. 1. 1]. Besides the *Senatus Consultum Velleianum* which extended to all women, married women were specially incapacitated from becoming sureties for their husbands [1 B. 234]. The benefit of this exception too it was competent for the wife to renounce [Voet 16. 1. 9]. These provisions were adopted in Holland.

Married woman, security of husband.

Law of domicil applies to relations between husband and wife.

It is the law of the domicil of the husband and wife which determines the personal powers and capacities incident to their status, and not the law of the place in which the marriage was celebrated [1 B. 245]. The wife, even before she leaves her residence, ceases to retain her former domicil, and acquires, by marriage, that of her husband. No regard, therefore, is had to the law of the country in which the wife was domiciled, unless the husband abandons his former domicil, and establishes his future domicil there [1 B. 245]. The law of the country where the husband was domiciled before his marriage will not be that to which resort is had, if on his marriage he abandons it and selects a new domicil in the country of his wife's former domicil, or in any other country. When, therefore, the husband at the time of his marriage abandons his former, and selects a new domicil, the law of the latter is that to which resort is had in deciding on the rights and capacities of the husband and wife [1 B. 246]. When the parties quit the matrimonial domicil and establish another, their status is governed by the law of the latter, and their capacities and powers are those which that law confers [1 B.

253]. The country in which a married woman may contract an obligation may not be that of her husband's domicil, and by the law which prevails there the authority of the husband may be more or less extensive, and the incapacity of the wife greater or less than it was by the law of his domicil; but the wife retains the incapacity to which she was subject by the law of the husband's domicil, and therefore the validity of an obligation in respect of her capacity and of the nature of the authority to be given by the husband to enable her to act, must be determined by that law, and not by the law of the place in which the obligation was contracted [1 B. 257].

Capacity of wife to contract governed by husband's domicil.

The husband, under the Roman-Dutch Law, received for his own use the rents and profits of the wife's property, although the property itself formed no part of the community. He had absolute power of disposing not only of the personal or movable, but also of the immovable or real property of the wife. He might hypothecate it, charge it with servitudes or other burdens, and sell it without the consent and in opposition to the will of his wife [Voet. 23. 5. 7]. The wife herself, as already observed, could make no disposition even of her own property without the authority of the husband. [Voet 23.4. 7].

Husband received rents and profits of wife's property. He might dispose of it.

Wife can make no disposition.

The husband might refuse to adiate, and he might repudiate, a succession which had devolved on the wife. He may obtain a division of a succession in which his wife is interested, effect a compromise, or cause a title by *usucapio* to be acquired in her estate, or have it subjected to forfeiture. For none of these acts is he accountable or chargeable to his wife or his heirs [Voet 23. 2. 55]. He might dispose of her property by gift, unless it appeared that the gift had been made for the purpose of defrauding her heirs. An instance of the fraud which would invalidate his gift was that of its having been made at a time when

Husband might repudiate succession devolving on wife.

from the state of her health her death might be shortly expected. [Voet 23. 2. 54].

Community of property.

Community of goods under the Roman-Dutch Law takes place immediately on the completion of the marriage, and once introduced, it can in no wise be afterwards done away with. [Voet 23. 4. 1; Grot. 2. 12. 3].

When community does not take place.

There are only two cases in which this community does not take place—(1) in clandestine marriages of minors and (2) in marriages between parties who have eloped [V. d. L. 1. 3. 8].

What property does not fall into community.

The community extends to everything possessed by the parties on each side at the time of marriage or acquired by them during marriage, whether by inheritance, legacy, donation, or otherwise, also to that which is comprehended under the name of *winst* or profit. No property of any kind is excepted, but such as after the death of the party possessing it, or the expiration of some limited time is to revert to a third person, and thus by its nature incapable of coming into community. Further, property which after the death of the present possessor goes to the eldest in descent of the family and goods affected with a trust and the like enter not into community [V. d. L. 1. 3. 8].

Community extends to losses, &c.

The community extends not only to the profit or gain made during marriage, but also to the losses and charges on the property on each side. Among these are to be reckoned the debts, not only those contracted during marriage, but also those with which either of the parties was affected before the marriage [*Ibid.*].

Consequences of community.

The consequences of the community of goods are as follow—(1) The goods of both parties at the marriage as well as those after acquired are during the marriage common. (2) The property during the marriage is under the control and disposition of the husband. (3) All debts contracted before the marriage are common, and must be paid out of the common estate. (4) At the death of either of the parties this community of goods ceases *ipso jure*.

(5) The common goods of the husband and wife are then divided into two parts, one-half is assigned to the survivor, and the other half given over to the heirs of the deceased party [V. d. L. 1. 3. 8].

Community in case of clandestine marriages.

When it is said that community of property does not take place in cases of clandestine marriages of minors, it is to be understood that the meaning is that the community does not take place for the benefit or to the advantage of the person who has married a minor without the consent of the parents or relatives or of the court [Grot. Tr. Maas. 116 n.].

Community and *boedelhouderschap*.

When after the death of one of the parents the survivor remains in possession of the common estate [*boedelhouderschap*] having made no inventory, the consequence is that the community of goods still exists between the parent and the children, so far that the children enjoy one-half of all the profit made during community, but are not subject to the losses, which fall entirely on the surviving parent [V. d. L. 1. 5. 4]. This community takes place without any distinction, whether the children have attained majority or are still minors, but it is not admitted in favour of collateral heirs [Voet 24. 3. 28]. If either party, being abroad, should be ignorant of the death of the other, and on that account neglect to make an inventory, the community will continue [1 B. 306]. Its continuation, as it is admitted only for the benefit of the heirs, may be rejected by them when it will be injurious to them [Voet 24. 3. 30]. It is competent for them to require the survivor to make two inventories, the one containing an account of the property as it existed at the time of the dissolution, and the other an account of the present state of the property [Voet 24. 3. 30]. If, however, on a comparison of these accounts it should appear that at one period there has been an increase and at another a decrease, they cannot claim the continuation for the former and reject it for the latter; but they must

wholly adopt or wholly reject it [*Ibid.*]. Successions and bequests are comprised in this continuation of the community, if there existed between the deceased and the survivor the "general" community [Voet 24. 3. 29]. If it were excluded, and there was only the *communio quæstuum*, the latter only would be continued [*Ibid.*]. On a second marriage the community is continued between the children of the former marriage, their father, and the wife. The manner in which the property should in such a case be divided has given rise to some difference of opinion. It has been left to be governed by the discretion of the judge according to the circumstances of each case. [Voet 24. 3. 32]. Upon the death of the surviving parent, before a division is made, the community ceases, and does not continue with the step-parent [1 B. 307]. When the community is continued, the husband, if he be the survivor, does not retain the powers which were vested in him during the wife's life. His alienation by mortgage or sale cannot be sustained, unless it be for the benefit of the community, and he has obtained the sanction of the relations of the children and the authority of the Judge [1 B. 308 ; Grot. 2. 13. 3].

Community ceases on death of surviving parent.

Husband cannot alienate in case of community between him and children.

Surviving spouse may alienate property for payment of debt of deceased spouse.

It has been held in Ceylon that a surviving spouse, who has not taken out administration, may alienate or encumber any part of the joint estate for the payment of debts incurred during the subsistence of the community, or for other necessary purposes, possibly also for other purposes plainly beneficial to the estate. The purchaser from a widower who has not taken out administration takes an imperfect title, subject for its validity to proof on his part that the sale was for the payment of debts or other necessary expenses [*Edirimana Singham's Case*, Vand. D. C. 264]. This decision was followed in *Wijeratne v. Abeyweera* [5 S. C. C. 70], but the Court there added that in an action by heirs seeking to recover land as against a stranger claiming

under a mortgage created by the widower, the heirs must first show that without the subject-matter of the action they have not their proper shares. This right of the surviving spouse was further recognised in *Ferdinands v. Fernando* [5 S. C. C. 162] and *Amaris v. Perera* [Wendt 343]; and in *Romel v. Fernando* [1 S. C. R. 114] Clarence, J., said that under the Roman-Dutch Law the surviving husband, when there has been no administration, has a right to alienate or encumber the share of his deceased spouse only so far as a necessity of paying debts renders it beneficial to the heirs of the deceased spouse that that should be done.

Following these decisions, it was held in *Hadjiar v. Hendrick* [2 N. L. R. 26] that a widow who had been married in community of property could create a valid mortgage upon the common estate for paying her husband's debts, and the debt so contracted was not her own, but is chargeable upon the common estate; and in *Prins v. Pieris* [4 N. L. R. 353], that where a widow was sued for a debt contracted by the deceased spouse, and, in execution, the property of the deceased spouse was sold, his heirs and the widow were bound by such sale.

In *Silva v. Wattuhamy* [3 S. C. R. 104] Lawrie, A.C.J., was of opinion that, although the survivor of two spouses married in community of property could alienate the common estate for the purpose of paying debts leviable against the estate, in an action on a mortgage granted by the widow without the consent and concurrence of the heirs of her deceased husband, such heirs must be joined as parties.

To return to the subject of the community of property between the surviving spouse and the children—

Children may demand inventory.

If it be found that the community is not likely to be prosperous, the children may reject the rights of the community and require an inventory of the mother's share to

be made and delivered to them together with the interest or profits [*fructus*] derived from it [1 B. 308]. The interest and profits which are to be thus restored are subject to deduction on account of the children's maintenance [1 B. 308]. The inventory to be made so as to prevent this continuance of the community must be made by the survivor within a year and a day after the death of the deceased. It must be an inventory of the property as it existed at the time of the death, and the survivor should cause it to be delivered to the children, if they have attained their majority, or to their tutors, if they be minors. If the deceased has not appointed a tutor, or if the surviving parent be their tutor, an application is to be made to the Judge in order that there may be a tutor appointed for the purpose of receiving the inventory and the share of the children [1 B. 308]. The consequence of the omission to make and deliver the inventory within this time is the continuance of the community. Until the inventory is made a division of the property is not valid. The correctness of the inventory is verified on oath. If any part of the property has been omitted, the inventory is not for that reason to be treated as a nullity, and the community continued, but the children obtain redress by compelling the survivor to amend it by inserting the property omitted. The community having been terminated by the delivery of this inventory, it will not be revived, although the surviving parent should continue for any length of time to make use of the property as if it were still subject to it, but he will be accountable to the children for the profits he has derived from the property [1 B. 309].

Inventory to prevent continuance of community.

How continuance of community is to be prevented otherwise.

The continuance of the community may be prevented by other acts, although no inventory has been made. Thus, when the deceased has bequeathed to the survivor all the profits of the property in community, as the children are thereby excluded, they have no interest in respect of which they could claim an inventory. So, if

the deceased had made a certain specific bequest to the children, they could not require that the community should be continued on the ground that no inventory had been made, because when they received the bequest they ceased to have any further interest in the community. The community is ended when the survivor gives to a daughter a certain part of the property *in dotem*, or to the sons a certain sum of money in full of their respective interests in it. The community will not be considered resumed, although it should appear that the property which they had thus received was not equal to their interests in the estate of the deceased. But if the *dos* to the daughter or the sum of money to the son was *on account* or *in diminutionem* and not *in exclutionem* of their interests in the deceased parent's property, the community must be deemed to be still continued until the inventory be made and delivered [1 B. 310]. A compromise [*transactio*] respecting the amount and value of the property of the deceased to be delivered to the children will also have the effect of terminating the community. If they have reason to believe that the share assigned to them is less than it ought to have been, they may require an inventory to be exhibited ; and if such appears to be the fact, they can compel the survivor to make good to them the difference with interest and profits [*Ibid.*].

Continuance of community for benefit of parent.

The ancient community of property which used to be continued for the benefit of the surviving parent between such surviving parent and the minor children was abolished by a subsequent law in Zeeland, and in Holland by most of the pupillary laws which directed an inventory and assignment of the property to be made [V. d. K. 268]. The community, as observed already, was, however, recognised as continuing as a penalty to the surviving parent. Even in that sense it was not adopted everywhere in Holland and Zeeland [V. d. K. 270].

Is the law of continuing community in force in Ceylon?

In a well-considered judgment in case No. 21,043 of the District Court of Colombo, affirmed in appeal by the Collective Court [Vand. App. E. p. XLVI.], Lawson, D.J. held that this law of continuing community was in force in Ceylon so far as the property of the original community and its natural increase were concerned; but in the case of *Wijekoon v. Gurewardene* [1 S. C. R. 147] Dias, J. thought that this law had never been imported into Ceylon, and, referring to Vand. Rep. App. p. XLIX., said that it was even doubtful that there was any such law at all. Considering what we state above on the authority of Van der Keessel, it is clear that the law had not general acceptance in the Netherlands. Any way, its observance here in its integrity is likely to lead to a great deal of troublesome and, in most cases, abortive litigation.

Fruits of property tied up enter into community.

As regards feudal property and property tied up by last will, although it does not come into community, its fruits become liable thereto [Grot. 2. 10. 11].

Funeral expenses to be borne by heir.

Funeral expenses and other debts incurred after the death of the deceased spouse are to be borne by the heir of the deceased alone [Grot. 2. 11. 16].

How wife may renounce liability after husband's death.

The wife, in order to protect herself against being sued by creditors for the debts or engagements which the husband had contracted *stante matrimonio*, may renounce all the property which had been in community. In the olden time the formal mode of making this renunciation, or, as it was termed, the *solemnis abdicatio domus mortuariæ*, consisted in her depositing the keys of the house on her husband's coffin, and leaving the house in her common daily apparel. This did not, however, apply to the wives of merchants who had openly mixed themselves up in the business of buying and selling. The renunciation used also to be made by bringing the keys into Court, or by making the formal abdication before a notary and witnesses [Grot. 2. 12. 18, 19; Voet 42. 3. 12]. It was necessary

that the wife should relinquish everything to the creditors. If, therefore, previous to the *abdicatio* she had concealed or removed any part of the effects, she remained liable to the creditors [1 B. 311].

The effect of this renunciation is that she is not liable to be sued for any debts contracted by the husband during the marriage, but she remains liable for those which had been contracted by herself before or during her marriage. This privilege is confined to the wife. The husband cannot exercise it [1 B. 312]. The widow remains also liable for debts contracted in respect of a trade carried on by her [V. d. K. 226].

Inasmuch as whatever is not expressly provided for by antenuptial contract is made subject to the community, although community of property be excluded, community of all profit and loss accruing during the marriage remains [Grot. 2. 12. 11; 1 B. 282].

Community is either universal or particular.

The *communio bonorum* is either *universal* or *particular*. The former comprises all the property which belonged to the husband and wife before or at their marriage, and also that which they acquire during the coverture. The *communio particularis*, also called *communio quæstuum*, comprises only the property which is acquired by them during the coverture [1 B. 277]. By antenuptial contract either of these species of community might be excluded [1 B. 278].

Claim to community might be resisted on the ground of fraud.

Where there is an impediment to the union of two persons, and one of the parties is aware of it, but entices the other to marry, it is considered that the innocent party might resist a claim to community on the ground of fraud [1 B. 279].

Community takes place on first as well as second marriage, and though either party was a minor.

The community takes place as well on the second or third as on the first marriage of either of the parties [Voet 23. 2. 1, 2, 3], and the property of a party, even though he or she be a minor at the time of the marriage and not in actual management of it, passes into community [1 B. 280].

Rents of *fidei commissum* property pass into community.

Property held on *fidei commissum* does not pass into community, but the annual rents and profits of such property would [Voet 23. 2. 71; Grot. 2. 11. 8].

Gifts of money, &c., by husband do not fall into community.

Gifts of money, ornaments, apparel, &c., made *causa nuptiarum* by the husband to the wife, and which ordinarily precede the celebration of the marriage, are acquired and retained by the wife *pleno jure*, and do not fall into the community [Voet 23. 2. 78].

Liability for debts.

If the *communio bonorum* be excluded, and the *communio quæstuum* only adopted, the husband and wife and their estates become liable only for the debts contracted *stante matrimonio*, and not for those contracted by them before the marriage. This liability is the necessary legal effect of the *communio quæstuum* [1 B. 294].

Liability of wife for debts of husband is a consequence of marital power.

The liability of the wife and her property for the debts contracted by the husband *stante matrimonio* exists independently of either species of community, and is a consequence of the marital power. Her property is subject as between her and her husband to one moiety of those debts [Voet 23. 2. 52, 53]. So effectually is the property of the one transferred by operation of law to the other that, if a person marries a woman against whom a judgment had been obtained, such judgment would be executable against his property without any citation or other proceedings to declare it so executable [Voet 42. 1. 33]. The husband or wife whose property has been thus taken succeeds to the right of the creditor, and is reimbursed a moiety of the debt out of the community when the respective shares are assigned to each on its termination [1 B. 296]. The right of the creditor to resort to the estate of the one for the previous debt of the other can only be enforced *matrimonio adhuc constante*. It cannot be enforced against the heirs of that party who was not originally liable for the debt [Voet 23. 2. 52, 53; V. d.

Wife chargeable with liabilities of husband.

K. 224]. The wife becomes chargeable not only with the debts of the husband, but even with the liabilities which he has incurred. Thus, if he has been appointed tutor, the wife is equally with him accountable for his administration of the infant's estate, and bound to make good any debt which, on the result of that administration, may be owing to it [Voet 23. 2. 53]. Her property or that of the community is liable in respect of costs adjudged in a civil suit and penalties for the non-performance of her husband's contract [1 B. 208].

Heirs of wife not liable for more than moiety of husband's debts.

During the coverture a creditor of the husband may take the wife's property or that of the husband in execution for the whole debt; but after the dissolution, the creditor cannot proceed against the heirs of the wife for more than a moiety of the debt [Voet 42. 1. 33, 52; Grot. 2. 11. 14] unless, indeed, the husband had mortgaged the wife's estate, in which case the creditor could enforce his security for the whole debt [1 B. 299].

Liability of wife's property for husband's delicts.

The wife's share of the common property is liable for all contracts made by the husband; but her share is not liable where the husband, being prosecuted criminally, is punished by sentence of fine or confiscation. Nor is her share liable where he is sued civilly on an obligation arising out of a delict amounting to crime [*Corey v. Fernando*, Ram. 60-62, p. 8]. Where a husband was sued on a contract to recover a debt which he had incurred through misappropriating moneys which had been entrusted to him in the course of his employment as a public officer, it was held by a majority of the Court that the obligation so incurred was an obligation arising *ex contractu* notwithstanding that the husband might have been criminally prosecuted for embezzlement; and that, consequently, the wife's share of the common estate was liable to be sold in satisfaction of such obligation [*Santiagopulle v. De Neise*, 8 S. C. C. 27].

Termination of community.

Community once induced cannot be excluded by any act *inter vivos.* It is suspended where a decree of separation, not only from bed and board, but also from property, is made by a competent court [V. d. K. 231]. Community ceases on the separation of husband and wife either by death or divorce *a vinculo matrimonii* or separation *thori et bonorum* [Voet 24. 3. 28 ; 1 B. 304]. So completely is the community terminated by the death of either of the parties that an agreement *a priori* that the heir should succeed to the community would be void [1 B. 305].

Division on termination of community.

The division of property which takes place on the termination of the community depends on the nature of the community. If it comprised all the property of the spouses the whole is divided into two equal parts, one of which is retained by the survivor, and the other is assigned to the heirs of the deceased. If there has been only the *communio quæstuum*, the same division is made of the *fructus* of the property. The property itself which belonged to the deceased passed to his heirs, and the survivor took that which exclusively belonged to him. Before the shares can be ascertained, those debts, charges, and expenses to which the property is subject must be deducted. In making the division questions arise respecting the liability of a child to collate or bring into hotchpot sums which may have been advanced to him by the parents [1 B. 310].

When the general *communio bonorum* has been excluded, expenses which are necessary [*necessariæ impensæ*] incurred by one party in respect of the property of the other, and which have not only made the property more productive for the time, but have added to its permanent value, are to be reimbursed by the owner of that property. Thus, if the husband had erected an embankment against a river to prevent part of the wife's land from being carried away, the expense of the work is to be estimated not according to its state

when the marriage was dissolved, but with reference to the advantage the estate derived from it at the time it was erected [Voet 25. 1. 2]. After the creditors whose debts accrued *stante matrimonio* have been satisfied, the husband is entitled, when there is a *communio quæstuum*, to recover or deduct expenses which are *utiles* so far as the subject on which they have been incurred is, at the time of the dissolution of the marriage, improved by them [Voet 25. 1. 3].

Doctrine of election.

The English doctrine of election on the part of the widow between dower and legacy does not apply to Ceylon. The widow married in community of property is entitled to her moiety of the joint property, and to any legacy left to her by her husband [*Tevanai v. Sinnecutty*, Ram. 63-68, p. 103].

How marriage is dissolved. Divorce.

Marriage is dissolved by death and by a divorce in law. The latter takes place for two causes—(1) adultery and (2) malicious desertion. Causes of any other kind, however strong they may appear, are insufficient for divorce. If, however, such causes can by an extended interpretation be brought within the reason of the two mentioned already, they are held sufficient. Thus, the commission of an unnatural crime or perpetual imprisonment are good grounds of divorce [V. d. L. 1. 3. 9; Grot. 1. 5. 18; and see Tr. Maas. 24]. When one spouse wilfully and entirely forsakes the other a divorce may, as held by the Tribunal of Amsterdam, be granted [Grot. Tr. Herb. 26, n.].

Grounds of dissolution in Ceylon.

In Ceylon, no marriage can be dissolved during the lifetime of the parties except by judgment of divorce *a vinculo matrimonii* pronounced in some competent Court. The judgment should be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotency at the time of marriage. Every Court in the Island having matrimonial jurisdiction is competent to dissolve

a marriage on any such ground [Ord. No. 2 of 1895, sect. 20].

What constitutes desertion.

An abstention on the part of a husband from conjugal intercourse must be shown affirmatively to be malicious and without reasonable cause in order to constitute such a constructive desertion as will entitle the wife to a divorce *a vinculo matrimonii* [D. C., Colombo, 80,966, 4 S. C. C. 107]. It may here be mentioned that a divorce *a vinculo* cannot be granted upon admissions in the pleadings. The conscience of the Court must be satisfied by proof that a case has been made out for its interposition [*Ibid*]. A divorce is sometimes allowed on the ground of malicious desertion after reasonable time is allowed to the offending spouse to return to the other. Thus, in D. C., Colombo, 55,353, [Vand. D. C. 237] the plaintiff who claimed divorce proved simple [not malicious] desertion. The District Judge allowed divorce, if the defendant did not return within a year. At the end of that time the Supreme Court decreed a divorce. The party charged with misconduct is entitled to have details of his acts complained against. The allegation of misconduct in the plaint should therefore specify the date and place of commission of each act complained of [*Samaraweera v. Jayawardane*, 4 N. L. R. 106]. Long absence and an intention not to return, or a man's refusal to live with his wife upon some pretext which will not bear examination, will constitute *desertio maliciosa*. Thus where the marriage of the plaintiff and the defendant was duly registered, but consummation thereof was postponed until the performance of certain religious ceremonies, the performance of which the defendant put off from time to time on mere pretexts, the Court held that he had maliciously and without reasonable cause deserted his wife, and that she was entitled to have a decree of divorce [*Sinnattankam v. Vairamuttu*, 2 Br. 138].

Divorce cannot be granted on admissions.

Details of misconduct.

Facts constituting malicious desertion.

Offending spouse forfeits matrimonial rights.

Where a marriage is dissolved by divorce, the matrimonial rights of the offending spouse are forfeited. So, a wife divorced from her husband on account of his adultery, she having brought property into the marriage community and he having brought in nothing, was held solely entitled to all that she had brought in [*Dias v. Philips*, 5 S. C. C. 36]; and where a wife had been divorced from her husband on the ground of her malicious desertion, it was held, in an action brought by her to recover her dowry property, consisting partly of cash, partly of furniture, and partly of jewellery, that she had forfeited by her conduct the right to recover so much of the property as consisted of furniture [*Wijesundere v. Bartholomeus*, 6 S. C. C. 141].

Court cannot grant separation when not claimed.

Where a divorce *a vinculo matrimonii* is claimed, the Court cannot grant a separation *a mensâ et thoro* without being moved to do so by either party, and without hearing both parties [Vand. D. C. 180].

Jurisdiction of Court.

The question of jurisdiction was fully argued before, and considered by, the Judicial Committee of the Privy Council in the case of *Le Mesurier v. Le Mesurier* [1 N. L. R. 160], and it was there held that the Matrimonial Law applicable to British and European residents in Ceylon was the Roman-Dutch Law; that that law did not give jurisdiction to the courts of the country in which spouses, domiciled elsewhere, were for the time resident to entertain a divorce suit; that neither section 597 of the Civil Procedure Code nor previous enactments to a similar effect empowered a District Court to entertain a divorce suit which was not previously cognisable by the courts of the Island; and that according to international law, which was authoritative in the absence of any municipal law to the contrary, the true domicil of the married pair, as distinguished from their so-called matrimonial domicil; afforded the only test of jurisdiction to dissolve their marriage, and the courts of England would not

recognise as effectual the decree of a foreign court divorcing spouses who at the date had their domicil in England. In this case it was further held that although a District Court of the Island could not decree a dissolution of marriage in the case of the residents referred to above, yet it might, under the rules of international law, administer other remedies for matrimonial misconduct, such as judicial separation on the ground of cruelty, &c., and alimony for desertion.

The law on the subject is summarised in Campbell's Ruling Cases as follows—"The court of competent jurisdiction in the country where the husband is domiciled is the proper court to determine any question regarding the *marriage status*, and in particular to pronounce a judgment dissolving the marriage; and a judgment of divorce duly pronounced by such Court is valid everywhere" [5 C. R. C. 703; *Harvey v. Farnie*, 8 App. Cas. 43].

Adulterer to be made co-defendant.

Under section 598 of the Civil Procedure Code, in an action for a divorce *a vinculo matrimonii* in which the adultery of the wife is the cause or part of the cause of action, the plaintiff should make the alleged adulterer a co-defendant, unless he is excused from so doing on one of the following grounds—(1) That the defendant is leading the life of a prostitute, and that the plaintiff knows of no person with whom the adultery has been committed; (2) that the name of the alleged adulterer is unknown to the plaintiff, although he has made due efforts to discover it; and (3) that the alleged adulterer is dead. On this section, it was held in the case of *Ziegan v. Ziegan* [1 S. C. R. 3] that the excuse herein referred to could only be obtained by regular prayer to the court upon an affidavit or other sufficient evidence, and it should be embodied in the plaint, and further, that the mere insertion in the plaint of the name of the alleged adulterer as a co-defendant, no process being served upon him and no steps being

taken to bring him into the action, was not a sufficient compliance with the requirements of the section. Damage can of course be claimed from the adulterer, but grounds such as the loose character of the wife and the property of her paramour should be considered in the assessment of damages [*Walbeoff v. Mitchell*, Ram. 20–33, p. 141].

Curator cannot institute action on behalf of lunatic husband.

An action for divorce cannot be instituted by a curator *ad litem* on behalf of a lunatic husband [*per* Lawrie, J., in *Ranaweera v. Ensohamy*, 7. S. C. C. 116].

Adultery and *stuprum*.

Strictly speaking, adultery can be committed only with a married woman [see De Haas's *Cens. For.* 1. 3. 4. 39]. In later editions of the *Censura Forensis*, however, the words containing this distinction have been omitted. Properly speaking, says Voet, *stuprum* is committed with a virgin or a widow, and *adulterium* with a married woman [Voet 1. 8. 2]. See further on this subject V. L. 4. 37. 7 and the note at foot of p. 304, Volume II., of Kotze's Translation. Later authorities and Voet in 48. 5. 7 show that this distinction is not observed in modern times. Adultery, says Van der Linden [2. 7. 2], is the carnal connection between a married person, whether husband or wife, with any person other than his or her spouse. Adultery is committed either by two persons who are each already married, or by persons one of whom is married, and the other unmarried. The former is called *two-fold*, and the latter *simple*, adultery [*Ibid.*].

A woman who commits adultery loses thereby to the profit of the husband all such advantages as she would otherwise have enjoyed according to common law or the marriage settlement [Grot. Tr. Herb. 114 n.].

Division of joint estate.

On the dissolution of the marriage the joint estate is divided equally between the spouses or their heirs [Grot. 2. 11. 13].

How property on division is valued.

Property awarded on the dissolution of a marriage to the heirs of the deceased and to the survivor respectively is valued at the price for which it

might be sold [Grot. 2. 11. 14]. After the division the property of one spouse ceases to be liable for those debts of the other which were contracted before the marriage [Grot. 2. 11. 15].

Forfeiture of rights by wife guilty of adultery.

A wife who has been guilty of adultery forfeits in favour of her husband all the benefits she would otherwise have enjoyed whether under the common law or by antenuptial contract [Grot. Tr. Maas. 121, n.].

After divorce is marriage tie restored by resumption of cohabitation?

In the case of a divorce *a vinculo matrimonii*, Van Leeuwen [*Cens. For.* 1. 1. 3. 12] is of opinion that the marriage tie is restored on the parties resuming cohabitation, but Voet thinks that Van Leeuwen is "very greatly mistaken" here, and states that it is necessary that the formalities required by law should be repeated in order to restore the tie [Voet 1. 6. 11].

Separation *a mensâ et thoro*.

Separation of bed, board, cohabitation, and goods is a provisional separation of husband and wife adopted by the Dutch from the Canon Law. No more than a divorce *a vinculo matrimonii* can this be effected by the mere private agreement of the parties. Lawful reasons must be set forth in the application, tending to show that continuing to live together is dangerous or at least insupportable [V. d. L. 1. 3. 9]. This separation includes at the same time a division of the goods, and is duly published. The community induced by law on marriage is suspended, and the marital power of the husband thereby ceases. However, should the parties come together again, the former rights and consequences of marriage revive [V. d. L. 1. 3. 9].

Grounds for separation.

Grotius mentions "protracted quarrels" as a ground of separation *a mensâ et thoro* [Grot. 1. 5. 20], and Van Leeuwen says [V. L. 1. 15. 3] that when, through the cruelty of husband or wife cohabitation becomes unbearable and some mischief is to be apprehended therefrom, a separation from bed and board and cohabitation is allowed.

Voluntary separation.

According to Voet a separation *thori et bonorum* may be either by the voluntary arrangement of the husband and wife or by judicial sentence. Their voluntary separation accompanied by a voluntary division of their property will not dissolve the community. The husband will still retain his marital authority over the wife's property, and she will still continue liable for the debts he may contract [Voet 24. 2. 19]; and a separation *thori et bonorum* and a division of the property of the husband and wife, although sanctioned by judicial sentence, will not terminate the community, nor will it, unless it be also accompanied by an interdict restraining the husband from interfering with the wife's property, in any degree abridge his marital power in the administration and alienation of it, or in binding her and her property by his contracts, nor will it enable the wife to make any disposition [Voet 24. 2. 17]. But Burge observes that there are jurists who give to this separation the effect of releasing the wife from liability from the husband's debts and engagements, and of excluding him from the further administration of her property [1 B. 304].

Termination of commun ity.

Second marriages.

After a dissolution of the marriage by the death of one of the parties, the survivor is at liberty to marry again, and in cases where the marriage has been dissolved on account of adultery or malicious desertion the innocent party may contract a second marriage. As to the question whether it is also permitted to the guilty party to marry again, while the other remains unmarried, Van der Linden says that there is no law which prohibits this, except it be to the person with whom the adultery was committed [V. d. L. 1. 3. 10].

Gift to spouse of second marriage.

Under the Dutch Law which adopted the *Lex hac edictali* a man or woman marrying again having children by a former marriage may not give to each other during their life or by a last will more than the least portion which is left to any one of the children of the former

marriage [*filiale partie*]. All that is given or bequeathed beyond this is taken and added to the shares of the children by the first marriage [V. d. L. 1. 3. 10]. Grotius lays down the law thus—A man or woman contracting a second marriage with a widow or widower who has children by a former marriage cannot by antenuptial contract stipulate in it for more of such spouse's property than a child's portion [Grot. 2. 12. 6. See V. L. 1. 14. 4].

Tacit hypothec to children of former marriage

In case of a second marriage by either of the parents a tacit hypothec was given to the children of the former marriage on the property of the parent marrying a second time. The children of a deceased child were entitled to the same right *jure representationis* [1 B. 329]. The surviving parent being about to enter upon a second marriage is required by law to furnish to the children by the first marriage, as a preliminary step, an inventory of their rights in the property of the deceased parent. For this purpose the surviving parent, with the next of kin to the children as guardians thereto chosen, makes an act whereby the amount of this property is ascertained and declared. This is called *vertigting* or *verweeging*. The duty of the guardian here is to examine the inventory and to make strict inquiry to prevent the children being prejudiced by the valuation or statement [V. d. K. 142, 143, 144. See *ante*, pp. 125, 127].

Inventory by surviving parent on second marriage.

Children of second marriage contracted in good faith.

A second marriage contracted in good faith by both parties, the former spouse being supposed to be dead, is so far valid as a putative marriage that the children born thereof are legitimate [V. d. K. 64]; and even if the second spouse alone has acted *bonâ fide*, having been deceived by the bigamist, a son born of such a union is also legitimate [V. d. K. 65].

Matrimonial Rights and Inheritance Ordinance.

In Ceylon, Ordinance No. 15 of 1876 [amended by Ordinance No. 2 of 1889 and Ordinance No. 3 of 1890, and proclaimed on the 29th June, 1877] prescribes the

law relating to the matrimonial rights of married persons with regard to property.

Nationality of married woman.

When a woman marries, after the Ordinance, a man of different race or nationality from her own, she is taken to be of the same race and nationality as her husband for all the purposes of the Ordinance, so long as the marriage subsists, and until she marries again.

Ordinance not to apply to Kandyans, &c.

Except to this extent, the Ordinance does not apply to Kandyans or Mohammedans or to Tamils of the Northern Province, who are subject to the Thesavalamai [sect. 2].

Rights of spouses married before Ordinance.

The matrimonial rights of any husband and wife with regard to property or status arising under or by virtue of a marriage solemnised before the Ordinance, and all rights which any other person may have acquired or become entitled to under and by virtue of any such marriage, are, except where it is otherwise provided by the Ordinance, governed by such law as would have been applicable thereto had the Ordinance not been passed [sect. 5].

Rights of spouses married after Ordinance as to movable property.

The respective matrimonial rights of every husband and wife domiciled or resident in this Island, and married after the proclamation of the Ordinance, in, to, or in respect of movable property are, during the subsistence of the marriage and of the domicil or residence aforesaid, governed by the provisions of the Ordinance [sect. 6].

Rights as to immovable property.

The respective matrimonial rights of every husband and wife married after the proclamation of the Ordinance in, to, or in respect of any immovable property situate in this Island are, during the marriage, governed by the provisions of the Ordinance [sect. 7].

No community of goods between spouses married after Ordinance

There is no community of goods between husband and wife, married after the proclamation of the Ordinance, as a consequence of marriage in respect of either movable or immovable property [sect. 8].

Immovable property of wife.

Immovable property to which a woman married after the proclamation of the Ordinance was entitled at the

time of her marriage, or has become entitled since, subject and without prejudice to the trusts of any will or settlement affecting the same, belongs to her for her separate estate. It is not liable for the debts or engagements of her husband, except those incurred for or in respect of the cultivation, upkeep, repairs, management, or improvement of such property, or for or in regard to any charges, rates, or taxes imposed by law in respect thereof. Her receipts alone or the receipts of her duly authorised agent are a good discharge for the rents, issues, and profits arising from or in respect of such property. Subject and without prejudice to any such trusts as aforesaid, such woman has as full power of disposing of and dealing with such property, by any lawful act *inter vivos* with the written consent of her husband, or by last will without such consent, as if she were unmarried [sect. 9].

A mortgage created by a woman married after the proclamation of the Ordinance over immovable property belonging to her separate estate amounts to an act of disposing of and dealing with such property within the meaning of this section, and requires the written consent of her husband for its validity; and when such consent has not been given, the creditor cannot even recover the debt due on the bond, inasmuch as the general personal incapacity of a married woman to bind herself by contract renders the instrument inoperative even as a simple money bond [*Silva v. Disanaike*, 2 C. L. R. 123].

Wages and earnings of married woman.

The wages and earnings of any married woman, whether married before or after the proclamation of the Ordinance, acquired or gained by her after the proclamation of the Ordinance in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill are

deemed and taken to be her separate property, independent of the debts, control, or engagements of her husband, and she has as full power of dealing with and disposing of the same or any investment thereof as if she were unmarried; and her receipts alone are a good discharge for such wages, earnings, money, and property and the principal and interest of any investment thereof [sect. 10].

Jewels, personal ornaments, &c.

All jewels and personal or household ornaments and wearing apparel belonging to a woman, married after the proclamation of the Ordinance, at the time of her marriage, and all jewels, personal ornaments, and apparel, suitable in respect of value to her rank and condition of life, which she has acquired during marriage, whether by gift from her husband or otherwise, and all tools, implements, and appliances belonging to her during marriage which may be requisite for the carrying on of any employment or trade in which she may be engaged separately from her husband, and all implements of husbandry, machinery, live and dead stock, belonging to her during marriage and *bonâ fide* kept upon and employed for the cultivation or proper uses of any immovable property belonging to her for her separate estate, subject and without prejudice to the trusts and provisions of any will or valid settlement affecting the same, belong to the woman for her separate estate, independent of the debts, control, and engagements of her husband, and she has as full power of disposing of and dealing with the same, by any lawful act *inter vivos* with the consent of her husband or by last will without such consent, as if she were unmarried [sect. 11].

Consent of husband for disposition of property.

In any case in which the consent of the husband is required by the Ordinance for the valid disposition of or dealing with any property by the wife, she may apply by petition to the Court of the district in which she

resides or in which the property is situate for an order authorising her to dispose of or deal with such property without her husband's consent, if she has been deserted by him or separated from him by mutual consent, or he is in prison under the sentence or order of a competent Court for a period exceeding two years, or if he is a lunatic or idiot, or his place of abode is unknown, or if his consent is unreasonably withheld, or the interest of the wife or children of the marriage require that such consent should be dispensed with. Such Court may, after summary inquiry into the truth of the petition, make such order, and that subject to such conditions and restrictions, as the justice of the case may require. The petition must bear a stamp of ten rupees, but no further stamps are required for any legal proceedings under this section ; and the order is subject to appeal. Where a separation *a mensa et thoro* has been decreed by a competent Court, the consent of the husband is not necessary to enable his wife to deal with or dispose of her property [sect. 12].

A wife applied for leave under this section to lease a parcel of land, and the husband objected on the ground that he was occupying a house on the land, and might be turned out of it by the lessee in the event of the land being leased. It was held that the objection was bad, that he was merely his wife's tenant at will, and was liable to be turned out at any time [*Silva v. Egonis*, 2 Br. 362]. Where a wife owning immovable property lived separate from her husband and desired to lease a portion of it without his consent and concurrence, the Supreme Court held that the proper course was not to apply for a general order empowering her to lease without her husband's consent and concurrence, but to bring the proposed lease before the Court, and ask that her husband's concurrence in it be dispensed with [*Silva v. Egonis*, 4 N. L. R. 101 ; 1 Br. 23].

Gifts by one spouse to the other.

A husband or wife, whether married before or after the proclamation of the Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, may make or join each other in making, during the marriage, any voluntary grant, gift, or settlement of any property to, upon, or in favour of the other. All such property, and all acquisitions made by either spouse out of or by means of the moneys or property of the other are, except as otherwise provided by section 11, subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant, &c., had not been made [sect. 13].

When questions arise as to acquisition of property by either spouse.

When a question arises between any woman married after the proclamation of the Ordinance, or any person claiming under her, and any creditor or alienee of her husband as to the mode and time of the acquisition of any property claimed by her, she or the person claiming under her must prove in what manner and at what time she became entitled to such property [sect. 14].

Questions relative to property declared to be separate property.

Where any question or dispute arises between two spouses, whether married before or after the proclamation of the Ordinance, relative to any property declared by the Ordinance to be the separate property of the wife, either party may apply by motion in a summary way to the District Court of the district in which he or she resides; and the Judge may make such order, direct such inquiry, and award such costs as he may think fit. He may, if either party so require, hear the application in his private room. The order of the Judge is subject to appeal, and every motion must bear a stamp of ten rupees; but no further stamp duty is leviable for proceedings under this section [sect. 16].

Policies of insurance by

A married woman, whether married before or after the proclamation of the Ordinance, may, after its

married woman.

proclamation, effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefits thereof, if expressed on the face of it to be so effected, enures accordingly, and the contract in such policy is as valid as if made with an unmarried woman [sect. 17].

Policy effected by married man.

A policy of insurance effected before or after the proclamation of the Ordinance by a married man, married before or after the proclamation, on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, enures, and is deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interests expressed; and it is not, so long as any object of the trust remains, subject to the control of the husband or his creditors, nor does it form part of his estate. If, however, it is proved that the policy was effected and the premium paid by the husband to defraud his creditors, they are entitled to receive out of the sum secured an amount equal to the premium so paid [sect. 18].

Movable property of wife.

All movable property to which a woman married after the proclamation of the Ordinance was entitled at the time of her marriage, or becomes entitled during her marriage, subject and without prejudice to any settlement affecting the same, and except so far as is by the Ordinance provided, vests absolutely in her husband [sect. 19].

"Settlement," meaning of.

The term "settlement" as used in the Ordinance was construed by Burnside, C.J., to mean a disposition of the property limiting the succession and disposal of it in a particular direction without power to disturb that succession or disposal except as provided by the settlement itself, and hence where two persons had married having entered into an agreement that there should be no community of property between them, that neither should be liable for the debts of the other, and that each

should, during the subsistence of the marriage, deal with and dispose of his or her separate property without the joinder or intervention of the other, it was held by a majority of the Court that this agreement did not amount to a settlement in law of the wife's property, and that, consequently, under the 19th section of the Ordinance, her movable property vested absolutely in her husband on their marriage [*In re* the estate of Louisa Krickenbeek, 6 S. C. C. 132].

The expression "movable property" used in this section includes even a chose in action. So, where in a marriage agreement entered into by the father of a bride, the bride, and the bridegroom, it was agreed that in the event of the father not carrying out one of the stipulations within a certain time after the marriage he should pay to the wife a certain sum of money, and he failed to carry out the stipulation after the marriage, it was held that the husband was entitled to sue for and recover the money without his wife's consent and making her a party to the case [*Babapulle v. Rajaratnam*, 5 N. L. R. 1]. Choses in action.

From the absolute right to the movable property of the wife given by the Ordinance to the husband a curious result ensued in the case of *Menik Ettena v. Allis* [3 N. L. R. 330]. There, the husband sold a parcel of land to T, and subsequently sold the same parcel to his own wife. The deed in favour of the wife was registered before that in favour of T, and the wife by reason of prior registration claimed a preferential title to the land. The Supreme Court, however, held that inasmuch as all movable property to which a woman is entitled vested absolutely in her husband, the money mentioned in the deed in favour of the wife as having been paid by her to her husband must be taken to be the husband's money, and the transfer to the wife was therefore without consideration, and did not gain priority by reason of prior registration. Sale by husband to wife, practically a gift.

Liability of wife to maintain children.

A married woman having separate property adequate for the purpose is subject to all such liability for the maintenance of her children as a widow is by law subject for such maintenance. Nothing in the Ordinance, however, relieves the husband from liability imposed upon him by law to maintain her children [sect. 22].

Order on husband for maintenance of wife and children.

The husband's liability to maintain his wife and children is the basis of Ordinance No. 19 of 1889. Under it, in the case of any person who having sufficient means neglects or refuses to maintain his wife or legitimate or illegitimate child unable to maintain itself, the Police Magistrate may order him to make a monthly allowance for the maintenance of wife or child at such monthly rate, not exceeding fifty rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct [sect. 3].

The husband by the marriage contract takes upon himself the duty of maintaining his wife so long as she remains faithful to her marriage vow. Women who violate their vow have no longer any claim upon the husband, except under settlement; and previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife. So, in an action by a wife against her husband for maintenance it is a good defence that the wife is guilty of adultery [*Ukko v. Tambya*, Ram. 63–68, p. 70]. It is contrary to public policy that a wife should be allowed to live apart from her husband, and then sue him for accumulated arrears of maintenance money [*Justina v. Silva*, 6 S. C. C. 136].

Placaat relating to marriage settlements.

For the removal of all doubts concerning the subject, the Ordinance [No. 15 of 1876] declares that the 6th section of the Placaat or Edict of the Emperor Charles V., dated the 4th October, 1540, relating to marriage settlements, has no force or operation in this Island [sect. 23].

CHAPTER IV.

Residence in relation to Civil Status.

The status, capacities, and rights of persons and their title to movable property depend to a large extent upon the law of the place of their domicil.

The domicil of a person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law [Dic. 79; *Whicker v. Hume*, 1858, 28 L. J. Ch. 396]. Domicil.

"Home" has been defined as follows. A person's home is that place or country (1) in which he, in fact, resides with the intention of residence [*animus manendi*], or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence, or (3) with regard to which, having so resided there, he retains the intention of residence, though he in fact no longer resides there. More briefly, a person's home is that place or country in which either he resides with the intention of residence [*animus manendi*] or in which he has so resided, and with regard to which he retains either residence or the intention of residence [Dic. 81]. "Home.

The domicil of a person has also been defined to be that place or country in which his habitation is fixed without any present intention of removing therefrom [*Craiguish v. Hewitt*, (1892) 3 Ch. 180].

The political domicil of a person is that domicil which has relation to the exercise by him of political rights. The forensic domicil is the domicil which may be the foundation of jurisdiction in consequence of a temporary residence, or it may be part of an agreement Political domicil. Forensic domicil.

that a certain place is to be considered the domicil for the purpose of enforcing its execution by the institution of legal proceedings.

Every person must have a domicil.

No person can at any time be without a domicil, and no person can have at the same time more than one domicil. This latter rule is, however, subject to the exception that a person within the operation of the Domicil Act, 1861 [24 and 25 Vict. Ch. 121], may possibly have one domicil for the purpose of testate or intestate succession, and another domicil for all other purposes [Dic. 94 ; *Forbes v. Forbes*, 23 L. J. Ch. 724 ; *Crookenden v. Fuller*, 1 Sw. and Tr. 441].

Civil domicil.

That domicil which is acquired by residence in a place in such circumstances as to its origin or continuance that the numerous civil rights of the person are determined by the law of that place is his civil domicil [1 B. 32].

Acquisition of landed estate.

The acquisition of landed estate has never alone been held sufficient to constitute domicil or fix the national character of the possessor [1 B. 54].

Domicil once acquired is retained.

A domicil once acquired is retained until it is changed (1) in the case of an independent person, by his own act ; (2) in the case of a dependent person, by the act of some one on whom he is dependent [Dic. 98].

Presumption as to retention of domicil.

The presumption of law is that the domicil of origin is retained until a change is proved. The burden of proving this is on him who alleges it [Voet. 5. 1. 99].

Domicil of origin and domicil of choice.

Every independent person has, at any given moment, either (1) the domicil received by him at his birth, which is usually called the domicil of origin, or (2) a domicil, not being the same as his domicil of origin, acquired or retained by him while independent by his own act, which is usually called a domicil of choice. [Dic. 99].

Abandonment of domicil of origin.

The domicil of origin may be abandoned and another domicil acquired, and that which has been acquired may again be changed. The presumption of

law, as observed already, is against the change of domicil, and the burden of proving the change rests on the party who alleges it [Voet 5. 1. 93].

Change of domicil.

A change of domicil must be a residence *sine animo revertendi*. A temporary residence for the purpose of health, travel, or business does not change the domicil. Also, every presumption is to be made in favour of the original domicil; no change can occur without an actual residence in a new place; and no new domicil can be obtained without a clear intention of abandoning the old [*The Lauderdale Peerage Case*, 10 App. Cas. 692, H. L. Sc.].

Constrained residence in foreign country.

A domicil will not be lost by a constrained residence in a foreign country [*In Goods of Duchess D'Orleans*, 28 L. J. P. 129].

Every person receives at, or as from, birth a domicil of origin.

Domicil of illegitimate child.

In the case of a legitimate child born during his father's lifetime, the domicil of origin of the child is the domicil of the father at the time of the child's birth [*Udny v. Udny*, L. R. 1. Sc. App. 441].

In the case of an illegitimate or posthumous child, the domicil of orgin is the domicil of his mother at the time of his birth.

In the case of a foundling, the domicil of origin is the country where he is born or found.

In the case of a legitimated person, the domicil of origin is, probably, the domicil which his father had at the time of such person's birth [Dic. 101].

Domicil of legitimated person.

A person born illegitimate, but afterwards legitimated, *e.g.*, by the subsequent marriage of his parents, stands after his legitimation in the position which he would have occupied had he been born legitimate. His domicil of origin is, therefore, apparently the country where his father was domiciled at the time of the legitimated person's birth. This proposition, however, is not free from doubt. It may be that even though a

child on legitimation takes, if still under age, the domicil of his father, yet his *domicil of origin* remains that of the legitimated person's mother at the time of his birth [Dic. 104].

How domicil of choice is acquired.

Every independent person can acquire a domicil of choice by the combination of residence [*factum*] and intention of permanent or indefinite residence [*animus manendi*], but not otherwise [Dic. 104; *Moorhouse v. Lord*, 10 H. L. 272].

A domicil of choice is acquired by one *animo et facto*, that is, by actual residence in the place, with the intention that the place thus chosen should be his principal and permanent residence, the seat of his fortune, his family, and his pursuits in life. A new domicil cannot be acquired by intention alone [Dig. 50. 1. 20; *Forbes v. Forbes*, 28 L. J. Ch. 724].

Where a person has establishments at two places.

Cases sometimes occur in which a person is possessed of establishments in two places, in each of which he resides. It then becomes necessary, in order to determine which is his real domicil, to examine the circumstances with the view of discovering to which of these places he gives the preference, or rather which of them is regarded by himself as his more permanent establishment. The place in which he was born will be an important and predominant circumstance only, as it is so in the estimation of the party himself [1 B. 45; Dig. 50. 1. 27. § 2].

Person must be *sui juris* to acquire domicil of choice.

The domicil of choice being that which the person himself establishes, it can only be acquired by him who is *sui juris*. It cannot, therefore, be acquired by a lunatic or minor [*Somervile v. Somervile*, 5 Ves. 750; Voet 5. 1. 100].

Nature of residence necessary to constitute domicil.

The nature of residence considered as a part of domicil, and thus looked at as a physical fact, independently of the *animus manendi*, has been defined as "habitual physical presence in a place or country;" that is, presence in a place or country for the greater part

of the time, be it long or short, which the person using the term "residence" contemplates. The residence need not be long in point of time. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil [*Bell v. Kennedy*, L. R. 1 Sc. App. 307].

Residence of wife and family.

In determining the question of a man's domicil it is material to consider where his wife and family have their permanent residence [*Platt v. Attorney-General for New South Wales*, 3 App. Cas. 336].

Animus manendi.

By the *animus manendi* is meant the present intention of permanent or indefinite residence in a given country or the absence of any present intention of not residing permanently or indefinitely in a given country [Dic. 108]. There are four points as to the character of this intention deserving notice—(1) the intention must amount to a purpose or choice; (2) the intention must be an intention to reside permanently or for an indefinite period; (3) the intention must be an intention of abandoning, *i.e.*, of ceasing to reside permanently in the former domicil; and (4) the intention need not be an intention to change allegiance [Dic. 108 *et seq.*; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Haldane v. Eckford*, L. R. 8 Eq. 631].

How long domicil of origin or of choice is retained.

The domicil of origin is retained until a domicil of choice is in fact acquired. A domicil of choice is retained until it is abandoned, whereupon either a new domicil of choice is acquired or the domicil of origin is resumed [Dic. 114; *Munroe v. Douglas*, 5 Madd. 371].

Revival of domicil of origin.

When a domicil of choice is abandoned, the domicil of origin revives, a special intention to revert to it being unnecessary [*Udny v. Udny*, L. R. 1 H. L. Sc. 441].

Circumstances indicating change of domicil.

The establishment of a new domicil, whether by the abandonment of that of origin or by changing that which had been subsequently acquired depends on the *animus* or intention of the party *ubi domicilium habeat*

existimatione animi esse accipiendum. Various circumstances are mentioned as affording evidence from which that intention may be inferred, and their number and variety must necessarily be increased by the varying usages and habits of different ages and countries. If the party has sold the capital he possessed in the place of his former domicil, and has removed himself and his family thence to another place, and has there invested it, and there sits himself down to improve or enjoy it with the intention of fixing his residence permanently there, no difficulty can arise in concluding that he has abandoned the domicil of his origin and established his domicil in the place to which he has thus removed. It is not, however, so established by his purchasing and occupying a house or furnishing it or investing a part of his capital there, nor by residence alone, but it must be residence with the intention that it should be permanent [see Voet 5. 1. 98; *Sharpe v. Crispin*, L. R. 1 P. 611].

Acceptance of office or service.

The acceptance of an office or service may require the person to remove from his former domicil and to take up his residence in some other place. If the nature of the office or service be such as to render his abode in the latter place uncertain by subjecting him to be removed to another place, it would not be consistent with the established definitions of domicil to regard him as having acquired a domicil in the latter place, and to have abandoned his former domicil [*Sharpe v. Crispin*, L. R. 1 P. 611; 38 L. J. P. 17; 1 B. 47; Voet 5. 1. 98]. If the office or employment be such as not to require permanent residence, yet if it be held only during pleasure and not for life, and consequently the person may at any time be removed from it, a residence in the place in which the duties of the employment or office are to be discharged does not of itself afford a presumption that the former domicil is abandoned [*Ibid.*].

How new domicil is acquired.

A new domicil is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there [*Bell v. Kennedy*, L. R. 1 Sc. App. 307].

Presumption as to domicil of origin.

Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence, with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof lies on the party who asserts that change [*Aikman v. Aikman*, 3 Macq. 863, *per* Ld. Cranworth].

How long domicil of choice continues.

A domicil of choice or a home is retained until both residence and intention to reside are in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in law as in fact [Dic. 115].

Domicil of minor.

Subject to the exceptions hereinafter mentioned, the domicil of a minor is during minority determined as follows—(1) The domicil of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicil of his father. (2) The domicil of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicil of the mother. (3) The domicil of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicil of his guardian, or may be changed by his guardian. This proposition, however, has not yet been the subject of final judicial decision.

The exceptions referred to are as follow—(1) The domicil of a minor is not changed by the mere remarriage of his mother. (2) The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicil [Dic. 120; *Udny v. Udny*, L. R. 1. H. L. Sc. 441; *Forbes v.*

Forbes, 28 L. J. Ch. 724; *Jopp v. Wood*, 4 De G. J. and S. 616].

Change of domicil of child by mother.

The domicil of the father or of the mother being a widow is that of the child, and a change by either of these parents of their former domicil would necessarily operate as a change of the child's domicil. It is, however, only during the mother's widowhood that she could change the domicil of her infant. The domicil which she acquired on her second marriage would not become that of the infant, but his domicil would continue to be that which the mother possessed previously to her second marriage [1 B. 39; Voet 5. 1. 100].

Power of parents to change domicil of child.

The power which the parent thus possesses of changing the domicil of his child is assimilated by writers to that which the guardian of an infant possesses of binding him by contracts entered into by him on behalf of the infant. But this power, as observed above, must be exercised by the parent *bonâ fide*. If he changed the domicil of the child who was sick, with no other apparent object than that of removing him from a place in which, according to the law of succession there prevailing, the parent would not succeed to the child's estate, to another place which admitted the parent to such succession, the removal would be deemed a fraud on the rights of those who would have succeeded, if no such removal had taken place, and would not be allowed to prevail in questions as to domicil. But if the health of the child was such as to afford no expectation of his death, or if there was any reasonable motive for the removal, or, indeed, if the child had attained an age when by the law of the place of his domicil he had the power of making a testament, in which latter case there would be no ground for presuming any interested motive on the part of the parent in changing his domicil, the removal could not be impeached [1 B. 29; Voet 5. 1. 100].

Domicil of married woman.

The domicil of a married woman is during coverture the same as, and changes with, the domicil of her husband [Dic. 127; *Dalhousie v. M'Douall*, 7 Cl. & F. 817].

The wife by her marriage, even before she leaves her residence, acquires the domicil of her husband. She retains it, even after the relationship is dissolved by the death of the husband, until she makes choice, and establishes another domicil or remarries [Voet 5. 1. 95, 96; *Dolphin v. Robins*, 7 H. L. Cas. 390].

It is only when the marriage is lawful and has actually taken place that the woman acquires the domicil of her husband. If there be no lawful marriage, or if the woman be only betrothed, she retains her own domicil [1. B. 35; Voet 5. 1. 95, 96].

The change by the husband of his domicil either of origin or of that which was his domicil of his marriage will necessarily operate as a change of that of the wife, but it seems that it may be the subject of a special contract that the wife should not be prejudiced in her rights by a change of the husband's domicil [1 B. 40; Voet 5. 1. 101].

The fact that a woman actually lives apart from her husband [*Warrender v. Warrender*, 3 Cl. & F. 488], or that they have separated by agreement [*Dolphin v. Robins*, 7 H. L. C. 390], or that the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights [*Yelverton v. Yelverton*, 1 Sw. & Tr. 574] does not enable the wife to acquire a separate domicil [*In re Daily*, 27 L. J. Ch. 751]. It is an open question whether even a judicial separation, not amounting to a divorce, would give a wife the power to acquire a domicil for herself [*Dolphin v. Robins*, 7 H. L. C. 390].

In case of divorce.

The ordinary presumption, that a wife is legally domiciled where the husband is, fails when there has been a sentence of divorce [*Williams v. Dormer*, 2 Rob. Ec. Rep. 505; 16 Jur. 366].

Acquisition of domicil by dependent person.

A domicil cannot be acquired by a dependent person through his own act [Dic. 128].

Minor's domicil.

Where there is no person capable of changing a minor's domicil, he retains, until the termination of his minority, the last domicil which he has received; and the last domicil which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act [Dic. 129. See *Jopp v. Wood*, 4 De G. J. & S. 616].

Domicil of person on attaining majority.

A person on attaining his majority retains the last domicil which he had during his minority until he changes it [Dic. 130].

Domicil of widow.

A widow retains her late husband's last domicil until she changes it; and a divorced woman retains the domicil which she had immediately before, or at the moment of, divorce until she changes it [*Ibid.*].

Domicil how ascertained.

The domicil of a person can always be ascertained by means of either (1) a legal presumption or (2) the known facts of the case.

A person's presence in a country is presumptive evidence of domicil; and when a person is known to have had a domicil in a given country, he is presumed, in the absence of proof of a change, to retain such domicil [Dic. 132; *Bell v. Kennedy*, L. R. 1. H. L. Sc. 307].

Any circumstance may be evidence of domicil which is evidence either of a person's residence or of his intention to reside permanently within a particular country; and expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicil [Dic. 135; *Attorney-General v. Wahlstaff*, 3 H. L. C. 374; 34 L. J. Ex. 29].

Residence *primâ facie* evidence of domicil.

Residence in a country is *primâ facie* evidence of the intention to reside there permanently [*animus manendi*], and in so far is evidence of domicil; but residence in a country is not even *primâ facie* evidence of domicil, when the nature of the residence either is inconsistent

with, or rebuts the presumption of, an intention to reside permanently. [Dic. 136; *Haldane v. Eckford*, L. R. 8 Eq. 631].

Domicil of a prisoner.

A prisoner retains, during imprisonment, the domicil which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned [*Burton v. Fisher*, Milward's Rep. 183].

Of a convict.

A person transported to a particular country for life absolutely loses, it is said, his original domicil. It is possible that in this instance the domicil of origin may be extinguished by act of law. Doubts may, however, be entertained whether there is any real distinction between the position of a convict and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicil which he possessed at the beginning of his imprisonment [Dic. 141].

Of an exile or refugee.

In the case of an exile, mere residence during the time of exile, however long, does not give him a domicil. An exile or a refugee, probably, may acquire a domicil in a foreign country, if he chooses to adopt it as his home, and may acquire a domicil in a foreign country by remaining there after his restoration to his own country has become possible [Dic. 142].

Of a lunatic.

In the case of a lunatic, the better opinion is that he retains the domicil which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane [see *Bempole v. Johnstone*, 3 Ves. Jun. 198; *Urquhart v. Butterfield*, 37 Ch. D. (C. A.) 357. See also *Sharpe v. Crispin*, 38 L. J. P. 17; L. R. 1 P. 611].

The view that a lunatic is a person not *sui juris*, and stands in somewhat the same relation to his committee as a child to his father, and that, therefore, his domicil can be fixed by his committee, is open to objection [Dic. 143].

Of an invalid.

In the case of an invalid the question, as in the case of any other person, is one of intention. If an invalid, for relief from sickness, changes his residence from one country to another, with the fixed intention of residing in the latter country for a certain definite time; or if he goes from one country to another in a dying state, in order to alleviate his sufferings, without any expectation of returning, he does not change his domicil. But if he, finding that his health suffers from the climate of his country, goes to another and settles there, intending to reside there permanently or indefinitely, he acquires a new domicil [Dic. 143 *et seq.*].

Of officials.

Official residence in a country is not in itself evidence of an intention to settle there, because all that can in general be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is held for a limited period. Occasionally, however, official residence may be *primâ facie* proof of a change of domicil. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Such a case is exceptional. As a rule, official residence is not a fact from which a change of domicil can be inferred, but much depends on the nature of the office [Dic. 146].

Of an ambassador.

An ambassador who represents his sovereign at a foreign court in general retains his existing domicil, which is, in most cases, the country the sovereign whereof he represents. An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicil in spite of his office, and this, though the domicil in the place of his residence is an acquired domicil, and the country which he represents is his domicil of origin [Dic. 147; *Attorney-General v. Kent* 31 L. J. Ex. 391].

A consul does not and cannot be persumed to acquire a domicil by merely living in a country as consul. On the other hand, he does not, by becoming consul, lose any domicil he already possesses. The length of his residence as consul is immaterial [Dic. 147]. Of a consul.

A soldier does not acquire a domicil in the place where he is stationed. A soldier or sailor in the Naval Service is domiciled in the country of the sovereign whom he serves; *i.e.*, he means to have his home within the territory of that sovereign, or at least not within the territory of any other power [Dic. 148; *Yelverton v. Yelverton*, 1 *Sw. & Tr.* 574; *Paxton v. Macreight*, 30 Ch. D. 165]. Of persons in Military or Naval Service.

A clergyman possessed of a cure must, it is said, be held to be domiciled at the place of his cure; but there is no reason to suppose that if the intention to reside there permanently did not in fact exist, the presumption might not be rebutted [Dic. 151]. Of a clergyman.

As to the domicil of a servant, the question whether he has or has not a "permanent house" in the same country as his master must, as in other cases, depend upon the combination of fact and intention [Dic. 151]. Of a servant.

The domicil of a corporation is the place considered by law to be the centre of its affairs, which, in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on; and in the case of any other corporation, is the place where its functions are discharged [Dic. 154; *Carron & Co. v. Maclaren*, 8 H. L. Cas. 416; 24 L. J. Ch. 620]. Of a corporation.

In an action or proceeding *in rem* our Courts have jurisdiction to determine the title to any immovable or movable property within the Colony, but they have no jurisdiction to dissolve the marriage of parties merely resident but not domiciled here at the commencement of the proceedings for divorce. [*Le Mesurier v.* Jurisdiction of Courts as to property. As to dissolution of marriage.

Le Mesurier, 64 L. J. P. C. 97; (1895) A. C. 517. See Dic. 292].

Succession to movables and immovables.

Our Courts have jurisdiction to administer and to determine the succession to all immovables and movables of a deceased person situate in the Colony. This jurisdiction is unaffected by the domicil of the deceased. Our Courts have also the jurisdiction to determine the succession to all movables wherever locally situate of a testate or intestate dying domiciled here [see Dic. 398].

Person domiciled in one country dying possessed of property in another.

Where a person domiciled in one country dies possessed of property situate in another, the personal estate is to be applied and administered according to the law of the place of domicil, and the real estate according to the law of the place where the real estate is situate [*Winchelsea (Earl) v. Garrety*, 2 Keen 293; 7 L. J. Ch. 99].

Application of law of country where a thing is situate.

The law of a country where a thing is situate [*lex situs*] determines whether the thing itself, or any right, obligation, or document connected with the thing, is to be considered an immovable or a movable. All rights over, or in relation to, an immovable are, generally, governed by the law of the country where the immovable is situate [*lex situs*]; but as to movables, a person's capacity to assign a movable, or any interest therein, is governed by the law of his domicil at the time of the assignment; and the assignment of a movable, wherever situate, in accordance with the law of the owner's domicil is valid. It is, however, to be noted that an assignment of a movable which can be touched, giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment [*lex situs*], is valid. The assignment also of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt [in so far as by analogy a *situs* can be attributed to a debt] is valid, provided that the

liabilities of the debtor are to be determined by the law governing the contract between him and the creditor, and that the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*; that is, the territorial law of the country to which the Court in which the action is brought belongs [Dic. 513 *et seq.*].

Law as to immovable property.

The *lex loci* governs exclusively the tenure, title, and descent of immovable property [*Fenton v. Livingstone*, 3 Macq. H. L. 497], also the incidents of immovable property and the right of alienating or limiting it [*Nelson v. Bridport*, 8 Beav. 547 ; *Simpson v. Fogo*, 32 L. J. Ch. 249].

All questions as to the burdens and liabilities of immovable property situate in a foreign country depend solely upon the *lex loci* in the absence of any trust or personal contract affecting it executed here [*Harrison v. Harrison*, 42. L. J. Ch. 495; L. R. 8 Ch. 342]. The validity of a testamentary disposition of English leasehold, however, is governed by the law of England and not by the law of the testator's domicil [*Freke v. Carberry*, L. R. 16 Eq. 461].

Leaseholds.

Law as to capacity to enter into contract.

A person's capacity to enter into a contract is, generally speaking, governed by the law of his domicil at the time of the making of the contract; but a person's capacity to contract in respect of an immovable is governed by the *lex situs* [Dic. 543].

Succession to movables.

The succession to the movables of an intestate is governed by the law of his domicil at the time of his death, without any reference to the law of the country where he was born, or he died, or had his domicil of origin, or where the movables are in fact situate at the time of his death. Any will of movables which is valid according to the law of the testator's domicil at the time of his death is valid; and any will of movables which is invalid according to the law of the testator's domicil at the time of his death on account of the testamentary incapacity of the testator, or the formal

invalidity of the will, *i.e.*, the want of the formalities required by such law, or the material invalidity of the will, *i.e.*, on account of its provisions being contrary to such law, is, as a general rule, invalid [Dic. 682 *et seq.*].

Execution of will.

Generally, a will must be executed according to the law of the country where the testator was domiciled at the time of his death [*Whicker v. Hume*, 7 H. L. Cas. 124].

Law as to will disposing of movable property.

The law of a deceased person's domicil at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate, and a will of movables is, in general, to be interpreted with reference to the law of the testator's domicil at the time when the will was made. Where, however, the will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country [Dic. 694; *Enohin v. Wylie*, 10 H. L. Cas. 1].

Summary of law as explained above.

To sum up. The law with regard to real estate is the *lex situs*, or *lex loci rei sitæ*, *i.e.*, the law of the country where the property is situated. Both as regards the capacity of transferring and the necessary forms to effect the transfer of real estate, the law of the country of which the land is an integral part is alone competent to speak. Real property is generally governed by the *lex loci rei sitæ;* and hence, the place where a will happens to be made, and the language in which it is written, are wholly unimportant as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into English, would "comprise and destine" the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England. The law with regard to personal estate, on the other hand, proceeds on the maxim, *Mobilia sequuntur personam*, *i.e.*, movable

property follows the person of the owner. Accordingly, the law as to the descent of personal property is governed by the law of the domicil. Contracts with regard to personal property are construed according to the *lex loci contractus*, *i.e.*, the law where the contract is made, unless the contract is to be performed somewhere else, when it is governed by the *lex loci solutionis*, *i.e.*, the law of the place where the contract is to be performed [see Brett. Com. Vol. 1, p. 8].

CHAPTER V.

Citizenship in relation to Civil Status.

"Citizenship," meaning of.

The term "citizenship" is here used in the wider sense in which it was understood in the later Roman Law, that is, the law after the time of Emperor Caracalla. "Citizen" there meant a subject, wherever resident, of the Roman Emperor. Similarly, "citizenship" is here used to denote the embodiment of those qualifications and relations that are necessary to constitute one a subject of the British Crown. The rights and disabilities here considered are therefore those of British subjects as contrasted with foreigners or aliens.

In Holland, aliens who settled down there were allowed almost the same rights as other inhabitants [V. d. L. 1. 2. 4], and foreigners generally had the same rights of succession and bequest as natives. They had also in all judicial proceedings the same rights as natives. Indeed, in some respects, they were treated with greater indulgence. For example, a suit to which one of the parties was a foreigner not domiciled in the country got an earlier hearing than one to which both parties were citizens [Grot. 1. 12. 3], although in a case of arrest for establishing jurisdiction and in respect of security to appear in Court and to satisfy the judgment the foreigner's condition was less advantageous [V. d. K. 175].

Who are foreigners.

Foreigners, according to Grotius and to the ancient laws, were all those who were born out of Holland, unless born of a Dutch father during his absence on affairs of State, or in the service of the East India Companies, or of a mother whilst casually travelling beyond the limits of the country [V. d. K. 173]. Relatives born and domiciled out of Holland might be heirs to foreigners residing in Holland [V. d. K. 174].

"Natives."

In Holland, "Natives," as distinguished from aliens or foreigners, were either Burghers, or citizens born in a town, or freemen, that is, those who resided in the country. Not merely were those persons considered Burghers by birth who, together with their ancestors, were born in the town, but they also who lived in the suburbs, and within the jurisdiction thereof, as, for instance, bleachers, millers, and others who were of use to the Burghers of the town, and were in all respects subject to the law of such town, for a law or custom of a town extended also to the suburbs; and they as well as the Burghers enjoyed the privileges of the town [V. L. 1. 10. 3].

Who were Burghers.

Those persons were also deemed to be born citizens who by accident were born out of the fixed domicil of their parents. So where one happened to be by chance out of the city, or to be living in another town by reason of his being engaged in the public service, or on a mission of State, and a child was born to him there, such child followed the Burgher law, not of the place of its birth, but of that where the parents had their fixed and regular domicil which they were held not to have abandoned by reason of accident or a mission of State. Further, by virtue of certain statutes and customary law, it was the rule in many places that a person who married a woman, the daughter of a native citizen, became himself a citizen; and their children likewise, though they might happen to be born out of the city, were deemed to be citizens, by birth, of the town where their mother was born [V. L. 1. 10. 3].

Freemen.

Freemen [*Poorters*] were those persons who, not having been born within a town, have purchased the rights of citizenship and of trading as citizens, which any one could obtain upon application and payment of a small sum, provided he took the oath of allegiance. Such persons, after having been for some years

freemen, acquired the full right of citinzenship, and together with other citizens could be appointed to all the offices and dignities of the town [V. L. 1. 104].

Freemen, moreover, had in every respect equal rights with citizens, and to several of them exemption from duty upon all merchandise and goods imported and exported by them had been granted by charter [V. L. 1. 10. 5].

There was in law little difference between natives and foreigners, and citizens and freemen. The distinction between them consisted principally in this, that foreigners were not readily advanced to high offices and dignities and to the management of public affairs.

How rights of citizenship were acquired.

Foreigners acquired the right of citizenship by grant from the States [Grot. 1. 12. 6].

Letters of naturalisation simply granted to strangers did not confer on them the right of attaining to dignities. The advantages of letters of naturalization *ad honores* were greater, for thereby an opening was afforded to persons born out of Holland of acquiring most of the dignities of that country [V. D. K. 177].

British subject.

Natural-born British subject.

Alien.

A British subject is any person who owes permanent allegiance to the Crown. A natural-born British subject is a British subject who has become a British subject at the moment of his birth. A naturalised British subject is any British subject who is not a natural-born British subject; and an "alien" means any person who is not a British subject [see Dic. 173]. An alien is, in fact, a subject of a foreign state who has not been born within the allegiance of the British Crown [*Reg. v. Burke*, 11 Cox. C. C. 138].

Actions by or against alien enemies. Trading with enemy.

No action can be maintained either by or in favour of an alien enemy [*Brandon v. Nesbitt*, 6 T. R. 23; 2 C. R. C. 649], and trading with an enemy or with an enemy's country without license of the Crown is illegal [*Potts v. Bell*, 8 T. R. 548: 2 C. R. C. 654].

Liability of aliens to criminal jurisdiction of English Courts.

A person not in the allegiance of the British Crown is amenable to the English courts having criminal jurisdiction for offences committed by him while within the territorial limits of the British Crown. The rule applies to the criminal jurisdiction of the Admiralty of England, and as so applied extends over British ships, not only on the high seas, but in rivers of a foreign country where the tide ebbs and flows, and where great ships go, although there is a concurrent jurisdiction in the courts of the foreign country [*Reg. v. Anderson*, L. R. 1 C. C. R. 161; 8 C. R. C. 1].

Who are natural-born British subjects.

Any person who, whatever the nationality of his parents, is born within the British dominions is a natural-born British subject, except as follows—(1) Any person who, his father being an alien enemy, is born in a part of the British dominions which, at the time of such person's birth, is in hostile occupation, is an alien. (2) Any person whose father, being an alien, is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the Sovereign of a foreign State, is, though born within the British dominions, an alien. [Dic. 175].

Any person (1) whose father is born within the British dominions, or (2) whose paternal grandfather is born within the British dominions is [though not born within the British dominions] a natural-born British subject; provided that no person is a natural-born British subject whose father is not at the time of such person's birth a natural-born British subject, and any person born out of the British dominions, whose father, though a natural-born British subject, is at the time of such person's birth in the actual service of any foreign prince or state in enmity with the Crown is not a natural-born British subject [Dic. 177].

Any person whose father, being a British subject, is at the time of such person's birth an ambassador, or

any public minister in the service of the Crown, is, though born out of the British dominions, a natural-born British subject [Dic. 180].

British nationality is not inherited through women [*Ibid.*].

Nationality of married women.

A married woman is to be deemed to be a subject of the State of which her husband is for the time being a subject. A widow continues to be the subject of the State of which her late husband was at his death a subject until she changes her nationality; and a divorced woman continues to be the subject of the State of which her husband was a subject immediately before or at the moment of divorce, until she changes her nationality [Dic. 189].

Of infants.

Where a father or a mother, being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, or with such father while in the service of the Crown out of the United Kingdom, is to be deemed to be a naturalised British subject. This rule, according to better opinion, applies to children born out of the British dominions as well after as before the parent's naturalisation [Dic. 190. See *De Geer v. Stone*, 22 Ch. Div. 243].

Where a father being a British subject, or a mother being a British subject and a widow, becomes an alien, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, is to be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject [Dic. 193].

Where a father or a mother, being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother, who

during the infancy has become resident in the British dominions with such father or mother, is to be deemed to have assumed the position of a British subject to all intents [Dic. 195].

An alien friend has no legal right enforceable by action to enter British territory [*Musgrove v. Chung Teong Toy*, (1891), A. C. 272].

Application to be naturalised

In Ceylon, Ordinance No. 21 of 1890 provides for the naturalisation of aliens. Any person while actually residing in the Colony may apply to the Governor in Executive Council that the privileges of naturalisation may be conferred on him, and the Governor in Executive Council may, with or without assigning any reason, grant or refuse the application as he thinks most conducive to the public good. No appeal lies from his decision [sects. 1 & 3].

Oath of allegiance.

If the application is granted, the Colonial Secretary should by notice in writing require the applicant within thirty days from its date to take the oath of allegiance. The oath may be administered by any Police Magistrate or Justice of the Peace within the limits of his jurisdiction. The person administering the oath should grant to the applicant a certificate in writing of his having taken and subscribed the oath, and of the date of his taking and subscribing the same, and forward to the Colonial Secretary the oath so taken and a duplicate of the certificate [sect. 4].

Governor to issue letters patent.

On the production of the certificate aforesaid and on being satisfied that the applicant has duly taken the prescribed oath, the Governor may issue letters patent under the seal of the Colony granting to the applicant all the rights and privileges of a British subject, and thereupon the applicant will, within the limits of the Colony, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject [sect. 5].

Letters to be enrolled in Supreme Court.

The letters patent should bear a stamp of one hundred rupees to be supplied by the applicant, and be enrolled for safe custody in the Supreme Court of the Colony [sect. 5].

Governor may cancel letters patent.

If any material statement in the application be found to be false, the Governor may, by an order in writing, cancel the letters patent issued upon such application [sect. 6].

Publication in *Gazette*.

All letters patent and all orders cancelling the same should be published in the *Government Gazette* [sect. 7].

Rights and disabilities of naturalized persons.

A person naturalised in England becomes to all intents and purposes a British subject, and ceases to be an alien [*Reg. v. Manning*, 19 L. J. M. C. 1]; and an alien domiciled and naturalised in England is subject to the same disabilities as is a natural-born subject [*Mette v Mette*, 28 L. J. P. 117].

PART III.

Law of Things.

By "things" we mean everything external to man which can in any way be of use to man [Grot. 2. 1. 3; V. L. 2. 1. 1]. "Things" defined.

Things are classified as particular things [*res singulares*] and collections of things [*rerum universitates*] [Grot. 2. 1. 5; V. L. 2. 1. 1]. Classification of things.

A particular thing [*res singularis*] is one which does not contain anything within itself, as this man, that money, that land [Grot. 2. 1. 6]. A collection of things [*rerum universitas*] is either a whole consisting of many parts, as estates or inheritances, or a genus consisting of many species [Grot. 2. 1. 7, 8; V. L. 2. 1. 3]. Particular things and collections of things.

Particular things are either Corporeal or Incorporeal. Corporeal things are such as are visible to the outward sense, as this house, this book, &c., and are divided into Movable and Immovable. Whatever is fastened to immovable property by earth and nails is regarded as accessory to the same [Grot. 2. 1. 9–13]. Corporeal things.

Incorporeal things are such as are not visible to the senses, as a right of way over land [Grot. 2. 1. 14; V. L. 2. 1. 4] or other servitude, and inheritances, debts, &c., [Voet 1. 8. 11]. Incorporeal things.

There are, according to Voet, three species of corporeal things—(1) Movables, such as furniture, movable storehouses, ships, water mills standing at anchor and not affixed to land, &c. (2) Immovables, as estates. (3) Those moving themselves, such as slaves, animals, &c. Movable and immovable things and things moving themselves.

A thing which in its nature is movable is considered as an immovable when it is regarded as part of and an accession to an immovable. Thus, slaves when annexed When a movable is deemed an immovable.

to an estate cease to be regarded in their own proper nature, and are considered immovables [Voet 1. 8. 13] Estate fruits are movables, but those still hanging are to be considered as part of the estate, and are therefore immovables. In the same way are to be regarded metal, precious stones, sand. and chalk. Trees adhering to the soil are immovables. When they fall down or are cut down or rooted up, they are to be reckoned among movables, and when the estate is sold such do not belong to the purchaser [Grot. 1. 8. 13].

Trees adhering to the soil.

Fruits, so long as they are hanging on the trees, the crops until they are gathered, and timber trees, whilst they are standing, are things which, because they are attached and appendant to the ground, are immovable. But when the fruits or crops are gathered, or the trees cut down, as they then cease to be attached to the soil, they become movables. But although trees and shrubs when they are planted become part of the soil and immovable property, yet a distinction is admitted when they are planted in the course of the trade of the owner or occupier of the land, and for the purpose of sale. In such a case they are considered personal property. A nurseryman or gardener, at the end of his term, may remove and dispose of the trees, shrubs, &c., which he has planted for the purpose of sale [2 B. 7].

Trees and shrubs planted in course of trade of occupier.

If what were formerly movables are joined to buildings not for temporary but for perpetual use, they begin to be part of the buildings and thus to be immovables. If they are taken off with the intention of replacing, their character is not changed. When buildings are thrown down with the intention that they shall be restored, the ruins are to be accounted as immovables, in so far as they may be suited to the restoration of the house. The same may be laid down as to movables taken to a certain place for perpetual use there, although they be not naturally joined to immovables, or, though

intended to be so joined, have not yet begun to be joined to immovables [Voet 1. 8. 14].

Fixtures.

In *Brodie v. The Attorney-General* [7 N. L. R. 81] it was held that counters, cooking range, water tanks, electric bells, batteries and indicators, baths, lavatory furniture, &c., fixed by bolts, screws, and other ways, were fixtures which, in the absence of a special agreement, passed with the building. And on the question of the conversion of movables into immovables, Layard, C.J., in the course of his judgment, said—" Our law is that houses and other buildings erected on land are immovable corporeal things, and would pass by a sale of the land to the purchaser. Movables affixed or let into the ground or annexed to or attached to a building are immovables. They acquire the quality of immovables by reason not alone of their being affixed, but of their being affixed with the intention of permanently remaining. Thus, movables if fixed by the owner become immovables, though this would not apply if fixed by a tenant merely for the purpose of his tenancy. Voet [19. 2. 14] clearly establishes the right of the tenant to remove fixtures which he has made at his own cost. For Voet says that by the *actio conducti* the lessor may be sued to remove doors and other things which the tenant has made at his own cost so far as they can be removed without detriment to the subject hired. I cannot find any provision of our law which enables a vendor to remove from a house sold by him anything affixed to the building which is intended for the permanent use of the building and, as it were, a part of it. I understand Voet to lay down in 19. 1. 5 that when a house or building is sold, all things which were affixed to such house or building by the vendor prior to such sale, and intended to be used in respect of such house or building, must be delivered with the house or building as accessories thereof."

Price realized by sale of immovables.

Price obtained from the sale of immovable things is not immovable, although it sometimes stands, as far as certain effects of the law are concerned, in the place of the thing sold, and is judged by the same law as the thing itself [Voet 1. 8. 15].

Incorporeal things.

Incorporeal things, says Voet, are things which can neither be handled nor touched, and consist in a right, as inheritances, servitudes, debts, actions, and revenues [Voet 1. 8. 18].

May be movable or immovable.

Incorporeal things may also be classified under Movables and Immovables.

Prædial servitudes, for instance, are immovables; and as regards personal servitudes, they are accounted as movables or immovables according as they are imposed upon movable or immovable things [Voet 1. 8. 20].

Actions, movable or immovable.

An action *in personam* is movable property. As to real actions, those referring to immovable things are immovables, and those for the recovery of movable things are movables [Voet 1. 8. 21].

Rents.

Rents for which the due date has come are movables. Certain personal rents, redeemable or irredeemable, such as the right of charge for passage over a bridge, through a gate, ground rents, rents from emphyteutical lands, &c., are immovable property [Voet 1. 8. 22]. Rents of which the capital the creditor has no power to recover are also immovable property. Other rents in respect of which there is only a personal obligation on the part of the debtor, even though there is a further security of a mortgage in respect of them, are movable property [Voet 1. 8. 26, 27].

Van der Keessel's classification.

Van der Keessel says that by the Law of Holland, as under the Roman Law, incorporeal things, where the law or the will of the owner has given no direction to the contrary, are not comprehended under movables or immovables, as in the case of legacies, agreements, and mortgages. But when it becomes necessary to refer

them to one or other of these classes, then prædial servitudes and actions *in rem* should be considered as immovables, and actions *in personam*, although they tend to the recovery of an immovable thing or an immovable may have been mortgaged for the debt, should be reckoned as movables; excepting the action arising on the instrument called *kusting-brief* by which an immovable thing which has been sold is by the same formal instrument of cession so bound to the seller for the price that the latter has a preferent right as against prior general mortgages. The right of tithes, fines, and emphyteutic or ground rent and annual real rents and even mixed rents imposed on land, namely, such as cannot be redeemed, seem referable to the class of immovables. Bonds and securities, whether public or private, given for money lent, although they be secured by mortgage, as well as annual mixed rents, which are redeemable, are without question classed among movables [V. d. K. 178–181].

Movables follow owner's domicil.

Wherever movables may in reality be found, they are yet considered to be there where the owner has his domicil, but immovables where they really are. Immovables are ruled by the law of the place where they are situated, movables by the law of the domicil of the owner [Voet 1. 8. 30].

Things divine and human.

In their relation to persons, Things may be classified as Things Divine [*divini juris*] and Things Human [*humani juris*] [Grot. 2. 1. 15].

Voet's classification.

Voet classifies Things as follows—Things, he says, are said to belong either to "no one" or to "some one" [Voet 1. 8. 1]. Things belonging to "no one" are of human or divine right [*Ibid.*]. Of human right are those which are said to be common by the law of nations, as, for instance, the air, the sea, the seashore, wild beasts, birds, fish, gems found in the sea or on the seashore, precious stones, &c. [Voet 1. 8. 2].

Things belonging to us of divine right are either those things properly so called, as, for instance, sacred and religious things, or, by a certain analogy, as holy things [Voet 1. 8. 1]. For examples see Voet 1. 8. 6, 7.

Things belonging to some one are either in the public dominion of many or in the private dominion of individuals. In public dominion are the things of the public or of the State. In private dominion are things subject to the rule and arbitrament of individual owners [Voet 1. 8. 1].

Grotius' Classification.

Another classification of things, according to Grotius is—*Res Communes* [property of all men]; *Res Publicæ* or *Res Universitatis* [property of large societies of men]; *Res Singulorum* [of individual men]; and *Res Nullius* [of no one] [Grot. 2. 1. 16; V. L. 2. 1. 8].

Sea and air.

The sea and the air are common to all men. It has always been understood in Holland that foreigners are equally entitled with natives to sail and fish in the open sea and even along the shores. The sands of the sea and consequently also the seashore, or at least that portion of it which is for the greater part of the time or at mean tide, that is, midway between high and low water mark, covered by the sea, falls under the same law as the sea. The open shore belongs to the people of the country [Grot. 2. 1. 17-21]. The sea and sea-covered shore may be freely used by every one, but without injury to others [Grot. 2. 1. 22].

Open sea.

Jurisdiction over part of sea adjoining shore.

Rights over bays, inland waters, &c.

Right to fish.

The open sea is, strictly speaking, *nullius territorium*. A national jurisdiction is, nevertheless, claimed by maritime nations over that part of the sea which adjoins the shore, to a distance of a marine league seawards; and nations can claim an exclusive right, depending on the will of the Sovereign, over certain portions of water, such as bays, gulfs, straits, inland seas, and rivers. These claims, however, are in many cases doubtful. The right to fish upon the high seas, or on banks and

shoals in them, is open to all. This, however, does not include the right to fish freely in bays and mouths of rivers, which depends upon the will of the Sovereign. The right to fish in the open sea does not include the right to cure fish upon the shore. The shore is under the jurisdiction and control of the Sovereign of the maritime country, and cannot be used for that purpose without consent. The right to prohibit foreign fishermen from catching shell-fish is conceded to each nation, since these are caught near the shore, within tide-water, and need laws for their protection at certain seasons. The right to use the seashore itself between high and low water marks belongs to the public, and the Government have no right to its exclusive use. The rights of the Government in respect of the seashore are those of custodians on behalf of the public, and any grants by the Government are subject to the condition that they do not materially interfere with the public rights [Bruyn's Op. of Grot. 132].

Right to use seashore.

Under the English law, the property of the Crown in the seashore and mines underneath is limited by the line of medium high tides; and if the land has advanced by imperceptible alluvion, the line of medium high tides is still the boundary [*Attorney-Geveral v. Chambers*, 4 De G. M. & G. 206; 17 C. R. C. 555].

Seashore and mines underneath.

It is, however, not lawful for any person to collect or attempt to collect salt naturally formed, or to manufacture or attempt to manufacture salt by any process whatsoever, except on account of Government, and under the written license of the Government Agent of the Province or Assistant Government Agent of the district in which it is collected or manufactured [Ord. No. 6 of 1890, sect. 4].

Collection of salt.

The Crown may exercise some control as to the use of parts of the seashore by private individuals. It has been thought that the fishing industry would be

Control of Crown over seashore.

impossible unless the occupation of the shore for spreading nets and such other purposes was regulated by some responsible authority, and so it has been held that it is competent to the Crown, by its regularly appointed agents, to grant licenses to fishermen to spread their nets on the seashore or on land belonging to the Crown adjacent to the seashore [*Rowel v. Pieris*, 1 N. L. R. 81]. The common right of fishing in the open sea may be controlled by custom regulating the time and mode of fishing [3 Lor. 161]. No right of exclusive fishing in any particular part of the sea or at any particular time can, however, be acquired by any custom among fishermen regulating the times and places of fishing; but where a fisherman has actually begun fishing operations, and is prevented by force or violence from exercising his occupation, or is disturbed therein by another, then an action accrues to him to recover compensation [*Arumokam v. Tampaiya* 2 C. L. R. 205; 2 S. C. R. 57]. A party enclosing fish within a *madelle*,* although he has not actually captured them, has sufficient possession of them to entitle him to maintain trespass [2 Lor. 115; Vand. D. C. 247].

Right of fishing controlled by custom.

Where fish are enclosed by fishermen.

Government Agent may prohibit removal of sea sand.

In Ceylon, the Government Agent of any Province may prohibit the removal of stones or other substances from the seashore adjoining or near public roads and thoroughfares in any part of the district within his province, if, in his judgment, such removal is calculated to injure such roads and thoroughfares, and he may cause notice of such prohibition to be given in the district by such means as may seem to him likely to give the greatest publicity thereto. Removal after such prohibition is an offence punishable with fine and imprisonment (Ord. No. 20 of 1865).

Building on sea and shore.

Every one can build on the sea, so that not merely what is built, but even that part of the sea or shore

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* Literally fish-net [*maalu-delle*].

which is occupied by the building begins to be in the private ownership of the builder, and remains so until what is put up is destroyed. From that time the shore returns to its pristine condition. But he who builds must take care that he does not injure the public use, nor villas, buildings, or monuments of private persons erected in the neighbourhood [Voet 1. 8. 3].

But the builder on the sea or shore may by the State be required to give security for any damage likely to arise from the work or from the fault of the soil, unless he builds with the permission of the public authority, when such security as may be required by such authority should be given [Voet 1. 8. 4].

Pirates.

Pirates can be kept off and impeded in the use of the shore [Voet. 1. 8. 3].

Air vertically above one's own land

The air vertically above his own land every one may lawfully use for building purposes without any limit as to height, but in length and breadth not beyond his own land [Grot. 2. 1. 23 ; V. L. 2. 1. 11].

Meaning of "land."

In England, land in its legal signification comprehends not only the land itself, but also all that is above the soil—castles, houses, and other buildings, water, forests, and trees ; and also all that is below the surface—mines, earth, clay, quarries, and the like, the maxim of the law on this subject being *Cujus est solum ejus est usque ad cœlum et inferos* [1 Brett Com. 2].

English law as to ownership of minerals.

Primâ facie, in England, the owner of the surface is entitled to everything underneath it, except mines of gold and silver. By evidence of long possession, a right to the mines may be shown to exist separately from the right to the surface, but in the absence of express grant such a right will be presumed to be subject to a right in the owner of the surface to have the surface in its natural state supported [*Reg. v. Earl of Northumberland*, Plowden 310 ; *Humphries v. Brogden*, 12 Q. B. 739 ; 17 C. R. C. 393].

Meaning of "soil."

In view of the frequent use of the term "soil" in certain conveyances relating to land in Ceylon, it may here be mentioned that in England the word "soil," as used to describe the property of the lord in the waste of a manor, has been held *primâ facie* to include the surface and all that is below it [*Townley v. Gibson*, 2 Term. Rep. 701; 17 C. R. C. 476].

Reservation of mines and minerals.

A reservation of mines and minerals with power to work the minerals contained in a grant of land is *primâ facie* intended to reserve all mineral substances which can be got for the purpose of profit. The power to work them must be confined to such means only as do not involve destruction of or entry upon the surface [*Bell v. Wilson*, 35 L. J. Ch. 337; *Hext v. Gill*, L. R. 7 Ch. 699; 17 C. R. C. 422].

Meaning of "mines of coal, ironstone, or other minerals."

The words "mines of coal, ironstone, slate, or other minerals," excepted from the lands taken by a railway company in accordance with the Railways Clauses Consolidation Act, 1845, have been interpreted as extending to minerals which are ordinarily got by quarrying, but not to include a stratum of clay which forms the immediate subsoil [*Lord Provost and Magistrates of Glasgow v. Farie*, 13 App. Cas. 657; *Midland Railway Co. v. Robinson*, 15 App. Cas. 20; 17 C. R. C. 485].

Lessee's right to work mines.

A lessee of land without mention of mines may work open mines, but cannot open new mines [*Saunders v. Marwood*, Co. Rep. 12 *a*; *Clegg v. Rowland*, L. R. 2 Eq. 160; 17 C. R. C. 723].

In Ceylon, the Crown has always claimed to be entitled to a royalty on plumbago dug on private lands, and provision is made by Ordinance No. 21 of 1873 to collect this royalty by a levy by way of an export duty at the different ports of shipment. The rate is twenty-five cents per hundredweight [Ord. No. 22 of 1877, sect. 1].

Quarries.

Ordinance No. 8 of 1889 makes provision for the regulation of the working of quarries within towns

where Municipal Councils or Local Boards are established. And Ordinance No. 5 of 1890 provides for the better protection of the prerogative rights of the Crown in respect of gold, silver, gems, and precious stones found in mines in private lands in this Colony, and for the regulation and inspection of such mines; and it may be added that Ordinance No. 2 of 1896 provides for the regulation and inspection of mines and machinery and for the safety of persons employed in working mines and machinery in this Colony.

Gold, silver, &c., found in private lands.

Regulation and inspection of mines.

As already observed, the Crown has always asserted a prerogative right to levy a royalty on plumbago dug from private lands [Gren. 73, Part III. A]; and Crown grants often expressly reserve the right of the Crown to the minerals in the land granted. The grantee in such cases must pay the royalty on plumbago found in the land [Gren. 73, Part II. 32].

Right of Crown to plumbago on private lands.

Things belonging to large societies are either the property of the State [*res publicæ*] or of a smaller society [*res universitatis*]. The United States of Holland and West Vriesland were proprietors of the large rivers in so far as they flowed within the limits of Holland; also of the lakes and other navigable waters and of the beds of all such streams and waters together with the shores or banks of the same, in so far as they were for the greater part of the time covered with water [Grot. 2. 1. 25; V. L. 2. 1. 12]. The right of fishing in such streams belonged to the State, with this exception, that fishing with the rod was open to every one [Grot. 2. 1. 27, 28]. In Ceylon, the right of fishing in inland waters is, in some cases, controlled by legislation. Local Boards of Health and Improvement are given the power to make by-laws for regulating the mode and times of fishing [Ord. No. 13 of 1898, sect. 56, subsect. 10]. They cannot, however, altogether prohibit fishing in certain waters without some such authority as a license [*Tringham v. Vollenhoeven*, 2 C. L. R. 18].

Property of the State.

Right of fishing in inland waters.

To certain societies and corporations belonged, under the Roman-Dutch Law, the property in towns, trades, guilds, &c. This property was appropriated to various purposes [Grot. 2. 1. 31].

Municipal Councils.

Property vested in them.

In Ceylon, Ordinance No. 7 of 1887 consolidates and amends the law relating to Municipal Councils, and where Municipalities are established in pursuance of the Ordinance, all waste land, and all stone, cabook, gravel, quarries, and all lakes, ponds, tanks, reservoirs, aqueducts, and other waterworks situate within the Municipality, not being private property, which may be made over to the Municipal Council with the sanction of the Governor, are vested in the Council to be administered, and the revenue thereof to be employed and made use of for the benefit of the Municipality and for the purposes of the Ordinance [sect. 72]. All public streets, bridges, &c., also within the Municipality, except such as are specially exempted by the Governor by Proclamation, are also vested in the Council for the purposes of the Ordinance [sect. 73].

Power to levy rates and taxes.

Municipal Councils are empowered by the Ordinance to levy and recover rates and taxes for the maintenance of the police, the lighting of public streets, and for such other purposes within the towns in which they are respectively established.

Liability of Chairman for non-repair of bridge. Liability of the Council.

The Chairman of the Municipal Council is not liable in damages for injury sustained by one of the public by reason of the non-repair of a bridge vested in the Council [*Canekeratne v. Cameron*, 9 S. C. C. 158]. But an action may be maintained against the Council for damage occasioned by the non-repair of a bridge. If, however, the Council show that they have done all that a skilful person can reasonably be required to do in effecting repairs, they are not liable in damages [*Ludovici v. The Municipal Council of Colombo*, 4 C. C. 115.]

Under family property is included property dedicated by some member of a family for the support of young members of such family to be given by and to such persons as are specified in the endowment. If no special provision is made to that effect, the gift is understood to go to the next of kin of the giver. Of several persons in equally near relationship to one another males are preferred to females, and of several males or females the eldest is preferred to the younger ones, and if no surviving member of the family can be found who is in want of the same, the gift may go even to strangers [Grot. 2. 1. 38]. Family property.

Property of individuals is either alienable or inalienable. Inalienable property is that which belongs to a person in such a way as not to be capable of becoming the property of another, as a man's life, body, freedom, and reputation [Grot. 2. 1. 42]. No one may bind his body by contract, except in marriage [Grot. 2. 1. 46 ; and no one may by contract dispose of his freedom, although he may lawfully bind himself to do certain acts [Grot. 2. 1. 47]. Inalienable property.

Alienable property is such as by nature is capable of being owned by one man as well as by another. It is commonly called goods or property [Grot. 2. 1. 49]. Alienable property.

Property belonging to no one [*res nullius*] is such as since its origin or since its abandonment has never been taken possession of by any one, nor declared by positive law to belong to any one. Things which have since their origin never been taken possession of by any one are such as shells cast up by the sea and wild animals which have never been captured. Things which have since their abandonment never been taken possession of by any one are such as wild animals which having once been caught have made their escape, or things which have been abandoned, or property vacated by death and not adiated by any one, or largess thrown *Res nullius.* Wild animals. Abandoned things.

to a crowd. That which a man unwittingly loses from his wagon or throws overboard in a storm is not considered as abandoned. Things must be abandoned with the intention of no longer owning them. The intention is to be gathered from the circumstances [Grot 2. 1. 50, 52].

A wild animal belongs to the person who first captures it, but only so long as it remains in his power. It makes no difference on whose land he captured or killed it [*Gunesekere v. Babun*, 3 S. C. C. 14].

Certain things have since their origin or since their abandonment been declared by positive law to belong to certain persons. Intestate inheritances to which there are no heirs by blood, abandoned lands and flotsam and jetsam have, for instance, often been declared to be the property of the State. In the same way, heirs instituted by last will or, in default of such, the blood relations, have by law a right to the inheritance even before adiation, which inheritance cannot therefore be said to belong to no one [Grot. 2. 1. 54, 55].

Heirs have right to inheritance even before adiation.

Real rights and personal rights.

Rights in respect of things may be divided into Real rights [*Jura in re*] and Personal rights [*Jura ad rem vel in personam*] [Grot. 2. 1. 57 ; V. d. L. 1. 6. 1].

Real rights [*Jura in re*] are the rights of property subsisting between a person and a thing without reference to any other person. Personal rights [*Jura ad rem vel in personam*] are those by which one person is entitled to claim from another any act or thing [Grot. 2. 1. 58, 59]. Here, not the thing itself, but the person with whom I have dealt is bound to me, so that I have only one action against him for the delivery of the thing contracted for, or for the performance of the act stipulated ; for example, you may be in possession of goods which are my property, then my remedy is against the goods themselves, and I reclaim them as mine, although they may have come into a third hand. This is a real right ; but if I have lent you a sum of

money which you fail to repay at the stipulated time, then I have no right in any of your goods which form no part of your estate, but merely a personal action against you to compel payment. This is a personal right. In the first case, if your estate become insolvent, I reclaim, as owner, my property, which never formed part of your estate; but in the second case, I come in as a concurrent creditor, *pro ratâ*, with the others [V. d. L. 1. 6. 1].

An estate is a collection of things which includes everything belonging either to an individual alone or to several persons in partnership together with the incumbrances [Grot. 2. 11. 3]. An estate.

BOOK I.

Jura in Re.

Different kinds of *Jura in re.*

The different kinds of right in a thing—*Jura in Re* —[see p. 188] are four in number—(1) The Right of Property; (2) the Right of Inheritance; (3) the Right of Servitude; (4) the Right of Pledge or Mortgage. Some writers mention another right, namely, the right of possession, as a species of right in a thing [V. d. L. 1. 6. 2].

CHAPTER I.

Property.

Property defined.

Consequences of right of property.

Property is that right by which anything is understood to belong to any particular person to the exclusion of all others. This right is especially known by its consequences—(1) It comprehends the right to enjoy the fruit or profits of the thing; (2) the right to make such orderly use of the thing as the owner may think proper; (3) the right to alter or change the form of the thing at pleasure; (4) the right entirely to destroy the thing; (5) the right to prevent others from making use of it; and (6) the right to alienate or to make over to others any other sort of right in the thing; as, for example, the use of it. When all these consequences do not unite, the right of property is not perfect. We must, however, qualify all this with the limitation, provided the object of the law and the right of third persons are not affected thereby [V. d. L. 1. 7. 1; V. L. 2. 2. 1].

Ownership [*dominium*].

Ownership [*dominium*], says Grotius, is that attribute of a thing whereby a person, though not actually in

possession of it, may acquire the same by legal process [Grot. 2. 3. 1].

Full ownership [*dominium plenum*] is that where a person may for his own benefit do with a thing whatever he pleases as long as it is not forbidden by law. Qualified ownership is where something is wanting to this general power of doing everything [Grot 2. 3. 10, 11]. Full ownership.

Dominium, says Voet, in its wider sense, embraces all and every *jus in re*. In its stricter sense it is the right by which a thing is ours, and is either complete *dominium*, as when usufruct accompanies ownership, or less complete, consisting in mere bare ownership when the usufruct is enjoyed by some one else. Further, it is either natural or civil. A wife, for instance, has the natural *dominium* of her dowry, her husband the civil *dominium*. Lastly, it is direct, such, for instance, as the *dominium* which remains with the person who gives property in emphyteutic or feudal tenure, or fictionary, called by others the right nearest *dominium*, which emphyteutic tenants, vassals, and others similar have [Voet 6. 1. 1].

The owner of a thing may, even without returning its present possessor his money, recover it from him, although he holds *bonâ fide* and for value, unless the present possessor has bought it *bonâ fide* in market overt. In that case the possessor must be paid the price he declares on oath to have paid for it, if he cannot recover the same from the seller. So, licensed pawnbrokers and old-clothes-men are not bound to restore property to its owner without being paid the price they have given for it, unless they knew or had reasonable grounds for suspecting that the property belonged to others, and unless they had failed to expose the same to public view for a certain number of days. Where this has not been done, they come under the general law [Grot. 2. 3. 5 6]. Owner can recover thing from possessor. Pawnbrokers not bound to restore stolen things pawned without being given the amount lent.

In England, by the modern Acts which, in effect, embody the provision of Act 21, Hen. VIII., C. 11. goods which have been stolen, although they have been sold in *market overt*, revert in the original owner immediately upon the conviction of the felon [*Scattergood v. Sylvester*, 15 Q. B. 506; 16 C. R. C. 1].

Stone from a quarry.

Acquisition of private property for public purposes.

The right of an owner of property to prevent others from making use of it is subject to certain qualifications. Where, for instance, necessity for repairing or constructing buildings demands it, stones may be cut from a quarry without the consent of the owner, payment being, however, made therefor; and an estate may in the same manner wholly or partly be taken away by Government from a private person when necessary to the public good, sufficient compensation being paid therefor [Voet 1. 4. 7].

Road through private property.

Acquisition of buildings for public purposes.

If public roads are wasted away by the swiftness of a river or by a chasm, the nearest neighbour is bound on receiving remuneration to allow a road through his property [Voet 1. 4. 7]; and so may the buildings of private persons and their lands be taken for public use, on the owners being paid their value, for the purpose of building walls, widening ditches, making ducts, making or repairing mounds, &c. [Voet 1. 4. 7].

Boundaries.

Questions as to correct boundaries and demarcations of limits frequently arise between owners of contiguous lands. Where lands adjoin without any visible or recognisable line of division, the obligation attaches to each owner to allow the ancient boundary, in so far as the same can be ascertained from deeds, landmarks, witnesses, or tradition, to be fixed, or a new boundary to be laid down; and if for the sake of convenience more is assigned to one than to another, the same must be compensated for by a money payment [Grot. 3. 28. 18].

Lands extending to middle of dividing ditch.

All lands were in Holland considered to extend to the middle of the dividing ditch unless anything to the contrary was proved [Grot. 3. 28. 19].

Wherever the boundaries of lands belonging to different owners had become uncertain, whether accidentally or through the act of the owners or of some third person, an action for defining and settling them was provided by the Roman-Dutch Law [Voet. 10. 1. 1]. The *onus* of proof of the essential facts in such an action was on the plaintiff [Voet 10. 1. 3]. Action to define boundaries.

This action lies even where the two lands are divided by a private stream, but not if a public road or river intervene between them; nor does it obtain in the case of buildings. In regard to the gardens of adjoining buildings, however, a person may proceed by this action if the boundaries have become confused [Voet 10. 1. 5].

This action is given to and against contiguous occupiers of land, whether they be owners, usufructuaries, mortgagees, emphyteutic tenants, or *bonâ fide* possessors. It is not allowed to *mala fide* possessors, nor to one co-owner against another, when a boundary of the common property and one of a property belonging exclusively to one of the co-owners have become mixed up [Voet 10. 1. 6].

This action may be availed of for the purpose of having uncertain boundaries defined, and each property restricted to its own limits, in whatever way the confusion of boundaries may have occurred, whether it be by building or planting upon them, by removal, decay, or tampering with beacons, &c. If the old boundaries cannot conveniently be restored, new ones are to be fixed by the Judge, who may place boundaries differently from those that had already existed, so that one of the litigants may get a portion of the land of the other, in which case proper pecuniary compensation should b awarded [Voet 10. 1. 7].

In this action we may maintain a claim for damages also against the owner of the land contiguous to ours, if he was responsible for the confusion that had occurred.

We may also claim the restoration of every benefit, and whatever other personal claims may have to be satisfied [Voet 10. 1. 8].

Ordinance No. 1 of 1844 makes provision for the more easily ascertaining the boundaries of the several landed estates possessed by His Majesty's subjects within this Colony. Some of the more important provisions of that Ordinance are as follow—

Government Agent to require production of deeds and grant certificates of non-claim.

A Government Agent may require persons claiming to be owners of lands within his Province to produce to him their title deeds; and if it appear that any person so required to produce deeds has no deed or other instrument in support of his claim, or no survey of the land claimed by him, the Government Agent may cause a survey to be made at the cost of the claimant, and grant to him a certificate of the Crown having no claim to such land [sects. 1 & 2].

Where boundaries are not defined persons not liable for trespass.

No person is liable to any action for trespass for any entry upon any land, or to any action for damages in respect of any injury done to the same, if the title to such land is founded on any grant from the Crown or on a deed or other instrument to which is attached a correct and authenticated survey of the land or on a certificate of non-claim from the Crown, unless the boundaries of such land are clearly defined along their whole line or at such intervals as shall accurately show their whole line by some wall, bank, ditch, fence, posts, stones, or other sufficient landmarks or boundary, provided that such trespass or injury had not been wilfully committed [sect. 3].

Erroneous re-grant of land, boundaries whereof are not defined after grant already made.

In the event of a grant being made by the Crown to any person of land already granted by it to any other person, if at the time of such erroneous grant the boundaries of the land shall not have been clearly defined, and the second grantee enters upon such land, and clearly defines the boundaries thereof, and remains in undisturbed possession thereof for three years, and

cultivates or improves the same, he may retain such land upon payment to the original grantee of the value of the land at the time of the second grant, the second grantee having, however, the right to recover from the Crown the amount paid to it in respect of the erroneous grant [sect. 4].

Rights of original grantee where the second grantee has not had three years' possession.

If the second grantee has not had three years' possession, then the original grantee might enter upon and take possession of the land upon payment to the former of three-fourths of the improved value of the land, less the value of such land in its uncultivated state, the second grantee having the right to recover from the Crown the amount paid to it in respect of the erroneous grant. If, however, the first grantee decline to enter into possession of the land, he may recover from the second the value of the land and one-fourth of the value of the improvements, the second grantee having the right to recover from the Crown the amount paid to it in respect of the erroneous grant. If the first grantee had knowledge that the land was being improved, and wilfully or negligently abstained from giving notice of his title to the second, then the rights of the latter are the same as of one who has had full three years' possession, as stated above [sect. 5].

Owners of land held and possessed on instruments other than Crown grants mentioned in the third section, summarised above, of the Ordinance have the same rights and are subject to the same liabilities as original grantees from the Crown have and are subject to under sections 4 and 5 [see sects. 4 & 5].

Rights of person cultivating land, boundaries whereof are not defined.

If any person without fraud and in perfect good faith enter upon any uncultivated land belonging to any of His Majesty's subjects, the boundaries of which are not clearly defined, and cultivate or improve the same, and remain in undisturbed possession thereof for not less than two nor more than five years, the owner of the land cannot enter upon or take possession of the

same, except upon payment to the party in possession of three-fourths of the improved value of the land less its value in its uncultivated state. The proprietor may, however, at his option accept from the possessor one-fourth of the value of the land and one-fourth of the value of the cultivation or improvements thereupon, and convey the land to the latter. If the proprietor had knowledge that the land was being cultivated or improved, and wilfully or negligently abstained from giving notice to the party cultivating or improving of his title, he cannot re-enter upon the land, except upon payment to the possessor of the full improved value thereof, less the value thereof in its uncultivated state [sect. 6].

Meaning of "without fraud and in perfect good faith."

An encroachment made "without fraud and in perfect good faith" in this section means an encroachment made not only in ignorance of the true boundary, but in spite of reasonable diligence in endeavouring to ascertain the true boundary [*Ballardie v. Boustead*, 2 S. C. C. 9].

If the person who has cultivated or improved the land has had possession for more than five years, the proprietor cannot enter upon or take possession of it, except upon payment to the possessor of the full improved value thereof less the value of the land in its uncultivated state. The proprietor may, however, elect to claim from the possessor the value of the land in its uncultivated state; and upon payment to him of such value he should convey the land to the possessor. If within the five years the proprietor had knowledge of the fact that the land was being cultivated or improved, and wilfully or negligently abstained from giving notice of his title to the possessor, then the latter might pay the proprietor the value of the land when he first entered upon it, and be entitled to claim from the proprietor a conveyance thereof [sect. 7].

Owners of contiguous lands to contribute towards cost of common boundary.

Any subject of the Crown possessed of land on a Crown grant or certificate of non-claim from the Crown or on a deed to which a correct and authenticated survey of the land is attached may, if the boundaries of the land are not clearly defined, call upon the proprietor or occupant of any land adjoining it, not being His Majesty, by notice in writing, to cause one-half of the boundary between the two lands to be made or renewed, except where the liability of making or renewing such boundary or any part thereof is by any law, custom, or agreement otherwise determined. If the person noticed does not commence the work within thirty days after the service of the notice, and diligently proceed therewith, the person giving notice may have the work done and recover twice the amount of the necessary cost from the party in default. Where the land of a subject of the Crown adjoins land belonging to the Crown, the Government Agent of the Province in which the subject's land is situate may notice him to make or renew the whole of the boundary between the two lands or such part thereof as requires to be made or renewed. If the work be not commenced within thirty days after the service of such notice and diligently proceeded with, the Government Agent may have it done himself, and recover twice the amount of the necessary costs [sect. 8].

Right of Crown to compel owner of land adjoining its own to keep boundary in repair.

Cost of boundary already made to be recovered from person becoming owner of adjoining land.

If any subject of the Crown possessed of land on a title based on any of the documents mentioned in the third section of the Ordinance [see p. 194 *supra*] clearly define the boundaries of his land, as stated in that section, before the lands immediately adjoining thereto shall have been duly granted by the Crown or otherwise become private property, he may claim and recover from the persons who so become proprietors of such adjoining lands one-half of the actual value of the common boundaries then existing [sect. 9].

Questions of value, &c., to be decided by arbitration.

Questions as to the value of lands and the necessity or sufficiency of boundaries are to be decided by arbitration, for which provision is made by the Ordinance, taking, as a general rule, the value of similar land in the neighbourhood as a test [sects. 10 & 11].

Surveyor-General to be required to certify to sufficiency of boundaries.

Any person possessed of land on documents mentioned in the third section of the Ordinance [p. 194 *supra*], who has made boundaries to the same, may call upon the Surveyor-General to inspect such boundaries or cause the same to be inspected by some proper person; and the Surveyor-General is then bound to inspect the land or cause it to be inspected upon payment to him or into his office or into the hands of the Government Agent of the Province at the rate of fifty cents for every mile that the Surveyor-General or person authorised by him to make inspection has to travel to and from the land, and at the rate of ten rupees for every mile of boundary that has to be inspected. On the Surveyor-General being satisfied that the boundaries are sufficiently marked, and on payment of the costs of travelling and inspection being duly made, the Surveyor-General is required to give to the applicant a certificate to that effect. The certificate must express the period during which, in the opinion of the Surveyor-General, such boundaries will continue sufficiently clear to indicate the land in respect of which they have been made; and during such period the boundaries of such land are to be deemed and taken to be sufficiently defined for the purposes of the Ordinance [sect. 12].

No rights to be acquired as against minors, &c.

And no liability where

No right under the provisions of the Ordinance can be acquired by any person in respect of the entry upon and cultivation of land which is the property, sole or joint, of any person under twenty-one years of age or of any insane person; and no person is subject to the liabilities declared by the Ordinance for not making

proper boundaries, if the making thereof has been stayed by any order or judgment of any competent Court of law [sect. 13].

making of boundaries is prevented by Court.

The Ordinance makes it an offence wilfully and knowingly to remove, destroy, or efface landmarks or boundaries serving to mark the limits of lands, and attempts to do so, except for the purpose of repairing the same [sect. 14].

Knowingly destroying boundaries.

Reclame or *Rei vindicatio* is the action which arises under the head of property. It lies for the owner of anything movable or immovable, corporeal or incorporeal, against the possessor or any person who has *mala fide* divested him of the possession to deliver it up to the owner with all its fruits then in existence and those which the *mala fide* possessor has already enjoyed, or might have enjoyed under the deduction, however, of the costs and charges of the possessor in the thing [V. d. L. 1. 7. 3].

Rei vindicatio.

Expenses of possessor.

In an action *Rei Vindicatio*, where the defendant contests the plaintiff's title, but denies ouster, and no ouster is proved, there is no objection to a decree, subject to an appropriate order as to costs, merely declaratory of the plaintiff's title to the property claimed as against the defendant, if such title be established [see *Terunnanse v. Dias*, 7 S. C. C. 145]; and, conversely, it has been held that where the plaintiff was in possession of a parcel of land, and the defendant took forcible possession of it and removed the crops thereof, pleading his employer's title to the land as justification of his act, even though his employer had such title, the plaintiff is entitled to be restored to and quieted in possession of the land, and to recover damage for the trespass, inasmuch as the plaintiff, having been in possession under a *bonâ fide* claim, could not, except by due course of law, be ejected from the land [*Rawter v. Ross*, 3 S. C. C. 20]. And in the case of *Mudalihamy v. Appuhamy* [1 C. L. R. 67] Burnside, C.J., held that

Plaintiff may have declaration of title without proof of ouster.

Plaintiff ousted by defendant must be restored to possession even without proof of title.

in an action in ejectment, where the plaintiff was proved to have been in *bonâ fide* possession of the land at the time of ouster, the burden lies on the defendant to prove that he is owner of the land, and in the absence of such proof the plaintiff is entitled to judgment without proof of his title.

These are decisions before "The Ceylon Evidence Ordinance, 1895." The position appears to be the same under that Act. Under section 110 "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." It may be said that a plaintiff who, having been ousted from his property, comes to Court is no longer in possession of that property, and cannot, therefore, claim the benefit of this section; but, as has been held in a series of cases cited in the "Commentary on the Law of Evidence applicable to British India" by Ameer Ali and Woodroffe [1st Ed., p. 660] under section 110 of the Indian Evidence Act, which is identical with the section cited above of our Ordinance, force does not interrupt possession. He whose possession has been interrupted by an act of violence without any form of law or justice is nevertheless considered as a possessor, because he has the right to enter into possession again. The rule, therefore, enacted by this section has no application when the possession has been obtained by illegal means, such as force or fraud. A man cannot be allowed to take advantage of his own wrong in order to shift the burden of proof on his opponent. The ordinary rule, therefore, is that where the plaintiff proves that he was in possession, and was ousted by the defendant otherwise than by due course of law, the burden of proving title in the first instance is shifted upon the defendant, and in the event of the latter establishing his title will the plaintiff be required to

prove his [see further *Goonewardena v. Perera*, 5 N. L. R. 320; 2 Br. 337].

May be brought by one who never had possession.

This action, says Voet, arises from the right of *dominium*. By it we claim specific recovery of property belonging to us but possessed by some one else [Voet 6. 1. 2]. The fact that the plaintiff never had possession of the property is no bar to this action [Voet 6.1.3; *Punchi Hamy v. Arnolis*, 5 S. C. C. 160], nor is it a bar that the plaintiff's vendor had no possession. The execution and delivery of a conveyance, if the vendor had title to the land conveyed, transfers the title thereto to the purchaser; and by virtue merely of the title so created, the purchaser may maintain an action seeking for a declaration of title against a third party in possession without title or under a weaker title [*Appuhami v. Appuhami*, 3 S. C. C. 61]. The claimant should have acquired *dominiun* before the commencement of the action [Voet 6. 1. 4]; but if he, having *dominium* at the commencement of the suit, lost it during its progress, the defendant is entitled to be absolved [Voet 6. 1. 4].

Recovery of property stolen.

Property stolen from its owner may be recovered by him not only from the thief and his heirs, but from any *bonâ fide* or *malâ fide* possessor whatsoever, without even, in the case of a *bonâ fide* possessor, a refund of the price. But, generally speaking, pawnbrokers and money lenders can in good faith safely accept stolen property as a pledge. It cannot be recovered from them by the true owner, unless the money lent thereon is first repaid to them [Voet 6. 1. 7]. Where a thief has paid to his creditor stolen money and it has been by the latter *bonâ fide* spent or mixed up with other moneys, it cannot be vindicated, nor may the creditor be sued for its equivalent; nor may things sold at a public privileged fair be claimed by the true owner without a refund of the price to the purchaser nor can things which have been purchased from a

thief with the intention of preserving them to the owner be vindicated without payment of the price, so long as there is no colour of self-aggrandisement [Voet 6. 1. 8].

Stolen bank notes.

Property in a bank note passes like that in cash by delivery ; and a person taking it *bonâ fide* and for value is entitled to the property, although the note has been stolen from a former owner [*Miller v. Race*, 1 Burr. 453 ; 3 C. R. C. 626].

The owner of stolen goods has a personal action for their value against the thief and his heirs, and those who have *malâ fide* received the goods or consumed them and against their heirs. His right as against their property is concurrent with the rights of simple contract creditors. As regards those who had bought and sold the goods *bonâ fide*, the better opinion is that if they had bought for less than their fair value or had obtained them gratuitously, and sold them at a profit, the owner can recover to the extent of their gain [Voet 6. 1. 10]. Things purchased with stolen money cannot be vindicated by the owner of the money, nor has he a right in respect of such things over other simple contract creditors of the thief [Voet. 6. 1. 11].

Property alienated by oneself.

Lessor may bring action *rei vindicatio*.

No one may vindicate property alienated by himself, although the price may not yet have been paid, if credit had been given [Voet 6. 1. 14, 15]. But a lessor who has granted a lease of premises for a definite term may maintain the action *rei vindicatio* against a third person who has taken possession of the premises during the existence of the lease, and claims the premises as his own by an adverse title [*Allis v. Endris*, 3 S. C. R. 87]. It has also been held that the lessee too may maintain this action [*Perera v. Baba Appu*, 3 N. L. R. 48]; but the lessee is entitled to merely the use of the property, and the question whether he can be said to have the *dominium*, which, as shown already, is important among the elements

Can lessee maintain it ?

constituting the right to maintain an action *rei vindicatio*, has apparently not been considered in this case. An expulsion of the lessee from the premises leased gives a cause of action to the lessor, and it would appear to be necessary that adequate provision should be made in every lease to indemnify the lessor for costs of an action in the event of an ouster of the lessee, and generally to safeguard him against collusion between the lessee and those whom the latter may charge with trespass. In the absence of such provision, the lessor being obliged to secure to the lessee quiet enjoyment of the thing let [V. d. L. 1. 15. 12], the lessee, when ousted, may, presumably, give notice to the lessor and, in the event of no action being taken by the latter, sue him on the lease. The lessor might either sue the alleged trespasser in ejectment or plead collusion between him and the lessee as a defence to any action that may be brought against him by the lessee.

Property bought from the *Fiscus*.

Under the Roman-Dutch Law no one is liable to the vindicatory action who has purchased property belonging to another from the Treasury [*Fiscus*] or from the Sovereign's establishment. Such a purchaser is protected in his title, an action against the Treasury only being allowed [Voet 6. 1. 23].

Action lies against Crown.

An action *rei vindicatio* may be brought even against the Crown, although not an action in tort. So, where a plaintiff claimed from the Crown a parcel of land and damages and mesne profits arising from alleged wrongful possession on the part of the Crown, the plaintiff was allowed to strike out his claim for damages and mesne profits, and proceed with his action for the recovery of the land only [*Le Mesurier v. The Attorney-General*, 5 N. L. R. 65 ; 2 Br. 91].

Action for trespass against officers of Crown.

It may here be mentioned that an action for trespass committed or intended is not under the English Law maintainable against officials of the Crown or Government sued in their official capacity or as an official

body. Such an action will, however, lie against such officials in respect of acts actually done or directed by them if sued in their individual capacity, even although such acts be done by the authority of the Government [*Raleigh v. Goschen* (1898), 1 Ch. 73; 67 L. J. Ch. 59].

True owner may vindicate property from possessor.

As regards vindicating things alienated by a thief, a borrower, &c., Van der Keessel says as follows—The true owner of a thing, movable or immovable, which has been alienated without his consent, not only by one who has stolen it, but even by one to whom it has been lent or let or given in deposit, or by any other person not having a mandate to sell, may legally claim it from any one who is in possession of it, without making restitution of the price paid by him. Exceptions to this rule occur—(1) In the case of goods which have been *bonâ fide* sold in the public market. The price of these should be restored. (2) In the case of goods, even though stolen, which have been given in pledge to public pawnbrokers. (3) In the case of goods sold by old clothes' merchants, after having been publicly exposed for eight days. This exception was confined to only certain particular localities in Holland. (4) In the case of gold or silver sold to a goldsmith for a just price, and by him openly exposed [V. d. K. 183, 184].

Exceptions.

Action for production.

Under the Roman-Dutch Law an action for production (*ad exhibendum*) lay to a person as a preliminary to the institution of a vindicatory action in respect of the property of which production is sought. This action applied to movables only. In later times, in consequence of the power exercised by judges as matter of procedure to compel discovery and production, this action fell into disuse and there is no trace of its adoption in Ceylon. It is treated on by Voet in 10. 4. 4.

The Publician Action.

An action to recover possession, technically termed the Publician Action, was given, in certain circumstances, to those who had the *jus possessionis*. It was competent to the defendant in this action to plead title

as a defence. This form of action had well-nigh fallen into desuetude in later times in Holland, and does not appear to have been adopted in Ceylon. For the nature and scope of this action see Voet 6. 2.

There was also an action allowed to a co-owner to compel a partition of the common property, or a sale thereof and division of the proceeds. Under the Roman-Dutch law, when a thing which did not allow of being divided, such as a house, was sold under order of Court, the owner of the larger share had the right of pre-emption at the price offered by the owners of the smaller shares. When the shares were equal, the highest bidder was allowed to purchase [V. d. K. 775]. **Action to partition.**

Voet says that an action for partition was allowed under the Roman-Dutch law to those who owned property in undivided shares. It did not matter whether they were in actual possession or not [Voet 10. 3. 1].

In the case of a servitude created over the same place in favour of several persons this action was allowed in order that the "extent or times of use may be settled." This action was not allowed to those who possessed through force, secretly, or during pleasure, nor to depositaries, farm tenants, or to robbers [Voet 10. 3. 2].

If one owner had a farm adjoining the common property, it was thought to be more equitable to assign to him the portion which adjoined it. Payment of compensation might also be claimed in this action as against co-owners who had caused damage to the common property, or had prevented the other owners from doing what was necessary for the preservation of the common property, or had unlawfully taken the fruit thereof; and compensation might be decreed to such co-owners as had incurred expense in improving the common property [Voet 10. 3. 3].

The dismissal of an action for partition was no bar to a second action, nor could the right to bring such action be prescribed [Voet 10. 3. 6]. *Res judicata* as regards partition suits.

Innovation on common property by one or more co-owners.

No innovation can be made with regard to common property by one owner if the other objects, and if anything is done or ordered to be done to it by one of the owners against the wishes of the others, he can be compelled to restore the property to its original condition. One owner may, however, dispose of his share by selling or giving it to some third person against the wishes of the others, except after the commencement of a suit for partition [Voet 10. 4. 7].

Disagreement between co-owners as to building on common property.

If there be disagreement between the several owners of buildings, lands, or things owned by them in undivided shares as to leasing them, some being in favour of and others against letting, the better opinion is that the entire thing must be let when the use of it cannot conveniently be divided, especially if it was such property as was usually let. If, however, one of the co-owners wishes to have the entire use of the property upon payment of as much as is offered by a stranger, he is to be preferred [Voet 10. 4. 8].

Partition Ordinance of 1863.

In Ceylon, Ordinance No. 10 of 1863 provides for the partition or sale of lands held in common.

A co-owner may compel partition.

When any landed property belongs in common to two or more owners, any one of them might compel a partition or sale of the property. For this purpose he might file a suit in a competent court. The libel or plaint should contain a description of the property and a statement of the interests of the respective co-owners and of mortgagees, if any, and also of the improvements, if any, made on the property by any of the co-owners specifying the names of such co-owners [sect. 2].

Where co-owners cannot peaceably possess, remedy is partition.

Where one co-owner of a parcel of land cannot agree with another or the rest of the co-owners as to the manner in which the common property is to be possessed, or if joint possession be found to be impracticable, the appropriate remedy is a suit for partition to which all the co-owners are parties [*Silva v. Adria*, 2 S. C. C. 166; *Daniel v. Thevanis*, 2 S C. C. 171;

Rowel v. Moises, 4 N. L. R. 225] unless the matter in dispute can be fitly decided without endangering or interfering with the rights of the others [*Ranesinghe v. Cooray*, 2 Br. 20; *Silva v. Silva*, 1 Br. 340], or the action is only for damages for breach of a temporary contract for enjoyment, or the disputed share is a distinct entity in itself [D. C., Colombo, 84,120, 1 Br. Ap. C., P. IV.].

One co-owner may sue a trespasser in ejectment.

One of several co-owners may sue a stranger-trespasser in ejectment, and recover damages without joining the other co-owners as plaintiffs [*Ismail v. Andris*, 7 S. C. C. 48 and 87; *Unus v. Zayee*, 3 S. C. R. 56]. The necessity of the presence of all the co-owners before the Court in the event of disagreement among any number of them has not been removed by section 12 of the Civil Procedure Code. That section merely gives the right to any one co-owner to maintain an action which could be maintained by all. Obviously, such an action could only be against a trespasser [see *Arnolisa v. Dissan*, 4 N. L. R. 163; 1 Br. 215]. It may here be observed that the rights of co-owners of landed property in Ceylon are governed by the Roman-Dutch law. It is not competent for one co-owner against the will of another to deal with the property owned by them in a manner inconsistent with the purpose for which the joint ownership was constituted. One co-owner may, however, use and enjoy the property in such a manner as is natural and necessary in the circumstances. One of several co-owners of land may maintain an action for his share of the value of plumbago dug therein without a prayer for partition [*Siyadoris v. Hendrick*, 6 N. L. R. 275]. A receiver should not be appointed by the court merely to protect the pecuniary interests of one of two joint-owners of land. The protection of the property itself is what has to be considered in deciding the question as to the necessity for the appointment of a receiver [*Siyadoris v. Hendrick*, 2 C. L. R. 167; 1 S. C. R. 358].

Section 12 of Civil Procedure Code.

Law as to rights of co-owners.

Co-owner cannot deal with land in a manner inconsistent with common rights.

A co-owner's share of plumbago in land.

Receiver in respect of property owned in common.

Co-owner may as of right claim partition. Costs.

It is the right of a joint-owner of land to claim partition, although the other co-owners do not desire it. Costs in all partition suits, except such as result from contests on questions as to title among particular co-owners, are to be apportioned among all the co-owners *pro ratâ* [*De Silva v. Peris*, 9 S. C. R. 41; *Martin v. Lourensz*, 1 Br. 225].

Plaintiff must disclose all claimants.

The plaintiff in a suit for partition is bound to disclose in his libel, to the best of his knowledge, all the persons interested in the land which he seeks to have divided, and the extent of their shares and interests, at the peril of having his decree set aside for fraud [*Edo v. Uduma Lebbe*, 2 S. C. C. 114].

Several lands may be partitioned in one action.

There is no objection to a claim to partition several parcels of land in one and the same action [*Peris v. Peris*, 6 N. L. R. 321], provided the object of the action in reality is not to administer a whole estate under the guise of proceedings for partition [*Sado v. Mendis*, 2 S. C. C. 127].

Undivided share cannot be partitioned.

An undivided share of a large extent of land cannot be the subject of a partition suit unless the co-owners of the whole *corpus* are made parties to it [*Peris v. Peris*, 6 N. L. R. 321].

Partition may be claimed by party not in possession.

A partition suit may be brought by a party not in possession and whose title is disputed; and in partition suits the Court should not proceed on admissions, but must require evidence in support of the titles of all parties [*Silva v. Paulu*, 4 N. L. R. 174; *Fernando v. Mohamado*, 3 N. L. R. 321].

Can *fidei commissum* property be partitioned?

The question whether property burdened with a *fidei commissum* can be made the subject of proceedings under the Partition Ordinance cannot be said to have been finally decided. In 62,169, D. C., Colombo [Ram. 1877, 304], it was held by the Collective Court that it could not; but in *Sathianaden v. Matthespulle* [3 N. L. R. 200] the Supreme Court was of opinion that Ordinance No. 11 of 1876, which provided for the lease,

exchange, or sale of property subject to *fidei commisum*, removed the difficulty felt by the Court in the case cited above from Ramanathan's reports, and that now such property might be partitioned under the Ordinance. In *Saram v. Perera* [3 Br. 188] Bonser, C. J., however, thought that *fidei commissum* property could not be partitioned.

The Partition Ordinance itself makes provision for the partition of landed property that "belongs in common to two or more owners." There is no reason to suppose that *fidei commissum* property does not answer to this description. Unlike one having a mere usufructuary interest, a *fiduciarius* has "full ownership with the burden of *fidei commissum* or of making restitution" on the happening of a certain event [Voet 7. 1. 13]. Van der Linden says that he has a "real though burthened right of property" [V. L. 1. 9. 8]. *Fidei commissum* property held by several *fiduciarii* may, therefore, be said to "belong" to them. Moreover, if such property is not to be partitioned, the evils resulting from joint possession which the Ordinance was intended to remove may be largely perpetuated. There is indeed no reason why *fidei commissum* property should not be partitioned or sold, the entail still attaching to the portions respectively allotted to the several *fiduciarii*, or, in the event of a sale, to the proceeds, provided the Court takes more than ordinary precaution to see that the proceedings have been taken *bonâ fide* and to safeguard to the fullest possible extent the interests of the *fidei commissarii* and the heirs in expectancy.

Service of summons.

The summons in the suit must be served on the defendants or such of them as may be found, or, if they cannot be found, upon the person or persons in the actual possession of the property; or if there is no person in possession, then as the Court may direct [sect. 3].

Where defendants are in default

If the defendants be in default the Court may proceed to *ex parte* hearing, and in that case, if the plaintiff's

title be proved, give judgment on default decreeing partition or sale as the Court may deem fit. If the defendants appear and dispute any material allegation in the libel, the Court must proceed to examine the titles of all parties interested, and decree a partition or sale according to the application of the parties, or as to the Court may seem fit [sect. 4].

Where they dispute any allegation in libel.

The requirement as to examination of titles in this section must be strictly complied with. A partition suit is not a mere proceeding *inter partes* to be settled of consent or by the opinion of the Court upon such points as the parties choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title; and unless he makes out his title, his suit for partition must be dismissed. The paramount duty is cast by the Ordinance upon the Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court which is made good and conclusive against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge [*Mather v. Tamotharam Pillai*, 6 N. L. R. 246; *Manchehamy v. Andris*, 9 S. C. C. 64; *Fernando v. Saibo*, 1 Tamb. 75]. Even after a sale of the land on a judgment of consent a party may be allowed to claim the land, the sale being cancelled [*Fernando v. Perera*, 1 Tamb. 71].

Partition suit not to be decided on issues.

Order may be opened up even after sale.

All questions on claims in respect of improvements must also be decided by the Court, and should not be left to be dealt with by the commissioner to be appointed to partition [*Newman v. Mendis*, 1 Br. 77; *Ratwatte v. Banda*, 1 S. C. R. 345]. If during the hearing certain persons are named to the Court as proper parties to the suit on account of their having interests in the land entitling them to actual possession, the Court may call in aid the provisions of section 18 of the Civil

Claims for improvements.

Letting in new claimants.

Procedure Code in order to give such persons an opportunity to establish their claims [*Ratwatte v. Banda*, 1 S. C. R. 345]; and where it appears that a party to the suit has died leaving an estate worth over one thousand rupees in value the Court must direct administration to be taken out [*Fernando v. Fernando*, 1 Br. 301].

Where party to suit dies.

When a partition is decreed, the Court may issue a commission to a person agreed upon by the parties, or, if they cannot agree, to one named by the Court to carry into effect the decree. The commissioner must after thirty days' notice proceed in the presence of all parties concerned, if they appear, to make the partition according to the ascertained proportions of the several owners, and with reference to the value of any improvements made thereon and the party by whom they have been made, and in conformity with any special directions in the decree; and make his return to Court [sect. 5]. Difficulty in serving notice on a party is no ground to refuse the appointment of a commissioner or to refuse to issue the commission. If personal service of notice cannot be effected owing to the absence of a party from the Island, subsituted service may be sanctioned [*Nagoor v. Pakeer*, 5 N. L. R. 77; 2 Br. 25]. The commissioner in carrying out the partition decreed by the Court may, even without special direction from the Court, award owelty in adjusting the value of the divided portions. If the owelty is fair, the Court should allow it; but the parties should be heard *pro* and *con*, and the commissioner may be examined in support of his proposal [*De Croos v. Fernando*, 3 N. L. R. 348].

Commission to partition.

Substituted service of notice.

Owelty to be awarded.

On the receipt of the return the Court fixes a day, with notice to all parties, for considering it, and then, after summarily hearing the parties, and, if need be after a further reference, confirms or modifies the proposed partition, and enters final judgment accordingly [sect. 6].

Proceedings on receipt of return of commissioner.

Partition of share of applicant only.

If a partition of the share of the applicant can be made without interfering with the shares of the other owners, and they are willing to possess their shares in common, the Court may ascertain and define in severalty the share of the particular applicant only [sect. 7].

Commission for sale.

In the event of a decree for sale, the Court may issue a commission to a competent person decided upon, as in the case of a commission for partition, for the sale of the property. The commissioner should make a valuation and after notice, as the Court may direct, of not less than six weeks, put up the property for sale first among the co-owners at the appraised value, and if it be not purchased by any one of them, put up the property for sale by public auction to the highest bidder. The sale should be under such conditions as the Court directs and subject to any mortgage or other charge or incumbrance that may be on the property. The commissioner must make his return, and deposit the proceeds of sale in Court to be paid over to the persons entitled. The certificate under the hand of the Judge that the property has been sold under the order of the Court, setting forth the name of the purchaser, and that the purchase money has been duly paid into Court is sufficient evidence of the purchaser's title without any deed of transfer from the former owners [sect. 8].

Sale after decree for partition. Sale to be ordered only when partition is impracticable. Sale set aside for misconduct of heir.

The Court may order a sale even after a decree for partition has been made. When a partition appears impracticable, the Court may amend the decree and order a sale [*Domingo v. Don Appu*, 7 S. C. C. 169]. But a decree for sale is to be made only when partition is impracticable. The mere fact that the land is small is not sufficient ground to justify a decree for sale [*Chitterenaike v. Siman*, Ram. Rep. 1872–1876, 285]. A sale may be set aside for misconduct on the part of a co-heir. So where, at a stage when heirs only were allowed to bid for the land, one of them bid nominally for himself, but purchased the land on behalf of a stranger, the sale was cancelled [2 Lor. 41].

Decree conclusive against all claims.

The decree for partition or sale given as provided by the Ordinance is good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the property, although all persons concerned are not named in any of the proceedings, nor the title of the owners, nor of any of them, truly set forth. The decree is good and sufficient evidence of the partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty. Nothing in the Ordinance, however, is to be taken as affecting the right of any person prejudiced by the partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued [sect. 9].

When decree may be vacated.

Although the decree is binding on all, so long as it stands, it may be vacated for good reason. Thus, where a defendant satisfied the Court that summons had not been served on him, and where the proceedings appeared to be so irregular as not to amount, in fact, to partition proceedings, the final decree was set aside, and proceedings directed to be taken *de novo* [*Perera v. Fernando* 3 Br. 5]. A final decree duly entered, the procedure required by the Ordinance having been followed, cannot, however, be opened up, although a person interested, though he be a minor, had not been made a party to the suit. [*Randeni v. Allis*, 1 Br. 284.]

Decree conclusive.

It is now practically settled law that a decree in a partition suit is conclusive against all persons whomsoever; and persons owning interests in the land partitioned, whose title has by fraudulent collusion between the parties been concealed from the Court in the partition proceedings, are not entitled on that ground to have the decree set aside, their only remedy being an action for damages. [*Nono Hami v. Silva*, 9 S. C. C. 198; *Carolis v. Baba*, 7 S. C. C. 125; *Carolis v. Ratnaike*, 1 S. C. R. 274.] In the last case here cited Lawrie, J., was of opinion that, if in the final

scheme of division land belonging to a stranger and not covered by the description in the partition proceedings is included, the final decree based on such scheme has no effect against the stranger.

Conclusive decree is that under section 6.

The question whether the decree that is conclusive against the world is the interlocutory decree under section 4 or the final judgment under section 6, was considered in some cases, and it was finally decided by the Collective Court in *Peris v. Perera* [1 N. L. R. 362] that the conclusive decree was that under section 6.

Full inquiry should be made to ascertain all co-owners.

Bonser, C.J., further held in this case that the District Judge should take care that the inquiry was not a perfunctory one; and that it was only after he was reasonably satisfied that all the owners who could be found were parties to the action, using, if necessary, for the purpose, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties were entitled to certain shares, and directing a partition or sale, as the case might be. Withers, J., thought that claimants of shares who had notice of the proceedings, only when the commissioner had taken steps to prepare his return, should be let in and their claims inquired into, even if it happened that they purported to modify the interlocutory judgment as to the shares of the actual parties to the record, and that after hearing the new claimants and the former parties the Court might reform its interlocutory judgment.

Although the final decree is conclusive against all persons, no writ of ejectment can be issued in the partition suit itself against persons not parties to the record [Vand. D. C. 256].

Remuneration to commissioner.

The Court should award to the commissioner reasonable remuneration for his labour and for expenses incurred by him to be paid out of the money deposited in Court. The person making a deposit is entitled to recover from each of the co-proprietors, by proceeding in the same cause, a share of the costs of the partition

or sale proportionate to the share of such person in the property [sect. 10].

No dilatory plea is to be admitted in any suit for partition or sale [sect. 11]. Dilatory pleas not allowed.

The Ordinance is not to be taken as affecting the right of any mortgagee of the land which is the subject of the partition or sale. If, however, at the time a partition or sale is made an undivided share only of the land is subject to mortgage, the right of the mortgagee will be limited to the share in severalty allotted to the mortgagor under the same conditions &c., so far as the same can apply to a share in severalty. The owner of the share in severalty so subject to mortgage is liable, without a new deed of mortgage, to warrant and make good to the mortgagee the several part after the partition as he was bound to do before the partition [sect. 12]. Mortgagees of lands partitioned.

If at the time of partition the property or a share thereof is held subject to lease, the tenants remain tenants of the whole property, or of such part thereof as may be allotted under the partition to their landlord, under the same terms as they held the whole property or a share thereof prior to the partition. The owners of the several parts allotted under the partition are bound to warrant and make good to the tenant or tenants the several parts after the partition in terms of their stipulation in the lease with reference to the property leased [sect. 13]. Where property prior to partition is subject to lease.

In the event of a sale of the land under the Ordinance the purchaser's title would presumably be subject to the rights of the lessee under a subsisting lease. Sale subject to lease.

For the purposes of the Ordinance every person having a permanent right of property in any of the trees growing upon any land distinct from the ownership of the soil, and every person being the owner of any land apart from the ownership of the trees thereon is to be deemed to have an undivided interest in the land. Rights of separate owners of soil or trees.

The owner of the soil as well as the person having right in growing trees may compel a partition or sale. In all such cases, however, either party has the right of demanding a sale instead of a partition. The owner of the soil has a right of pre-emption upon a just appraisement by the commissioner of the value of the planter's interest and of any buildings or improvements made by him thereon [sect. 14].

Effect of deeds binding on co-proprietors.

A co-proprietor of land cannot compel a partition or sale under the Ordinance, if there is a valid or subsisting deed binding upon him for the cultivation of the land or the raising of any crops or produce thereon, for the purpose of selling the same, or for carrying on any trade, &c., having relation to or connected with the joint possession of the property, any of the terms of which will be broken by the partition or sale, unless the right of compelling a partition or sale is expressly reserved by such deed. A partition or sale contrary to the true intent and meaning of such deed is void [sect. 15].

Where undivided share is seized in execution.

When any undivided share or interest belonging to a judgment-debtor in any land is seized in execution, the fiscal may put up for sale such share or interest only, unless the co-proprietors notify to him in writing their wish that the whole land should be sold. In that case the fiscal must cause a just valuation to be made, as directed in the Ordinance, of the whole property, and after due notice put it up for sale, upon the usual conditions and subject to any mortgage or other charge or incumbrance which may be on the same, amongst the co-proprietors at the upset price for which the property has been valued. If the property be not bought by any of them, the fiscal should sell the same subject to any mortgage, &c., by public auction to the highest bidder. If the premises be purchased by a co-proprietor, the fiscal may recover from him the amount of the purchase and the expenses less his share of the proceeds. If the premises be purchased by any person other than a

co-proprietor, the fiscal must recover from him the full amount of the purchase money, and bring it into court to be paid over to the parties entitled. The debtor's share is to be paid to the judgment-creditor. In case of dispute as to the exact share of the debtor, the court may order the creditor to give security for the repayment of the money into court, if within two years it be found that the money did not belong to the debtor [sect. 16].

Alienation pending legal proceedings.

When any legal proceedings are instituted for a partition or sale of any property under the Ordinance, no co-owner can alienate or hypothecate his undivided share or interest, unless and until the court before which the proceedings were instituted has by its decree in the matter refused to grant the application for partition or sale. Any such alienation or hypothecation is void [sect. 17].

Is alienation absolutely void or void *quoad* partition only?

There was much difference of opinion on the question whether an alienation pending partition proceedings was absolutely void or void *quoad* the partition only. It came up for decision before the Collective Court in the case of *Annamalai v. Perera* [6 N. L. R. 108; 3 Br. 200], and it was held by a majority of the Court that such alienation was absolutely void. The older cases will be found cited in the judgments. The alienation in this case was as a matter of fact an alienation through the fiscal, consequent on a seizure in execution. The subsidiary question, whether such an alienation stood on the same footing as a private alienation by the party himself, was not seriously discussed; but Wendt, J., expressed himself as inclined to the opinion that as regards the above section of the Partition Ordinance there was a difference between an alienation by the public authority of the fiscal and an alienation by the execution-debtor. In a later case [unreported] Layard, C.J., was of that opinion, but thought that the matter

had been set at rest by the case of *Annamalai v. Perera* cited above, and felt himself bound by the opinion of the majority of the judges in that case.

The alienation referred to in this section must, however, be an alienation by one of the parties to the suit. The section is not to be taken as affecting strangers [*Wijewardene v. Seetalahamy*, 1 Br. 346].

No survivorship in case of poperty held jointly.

All landed property belonging to two or more persons jointly is to be deemed and taken to be held by them in common. Upon the decease of one co-owner his share does not vest in the survivors, but forms part of his estate, and his heir or devisee becomes a co-proprietor of the property, to the extent of his interest, with the survivors, unless it is otherwise provided in the instrument under which the property is jointly held or in any agreement mutually entered into between the co-owners [sect. 18].

Pleadings exempt from stamp duty.

Pleadings and other documents in partition proceedings are exempt from stamp duty [Ord. No. 10 of 1897, sect. 3]. But where a Court finds that partition proceedings have been dishonestly or improperly instituted, it may in disposing of the suit condemn the plaintiff in double the amount of stamp duty which, but for the exemption aforesaid, would have been payable by both the plaintiff and the defendant, and enforce payment by issue of writs of execution against person and property [sect. 4].

Processes to be stamped.

Damages in partition suits.

Processes in partition suits do not come within the scope of exemptions under this section [*Perera v. Julihamy*, 1 Tamb. 25]; and in the case of *Samarasinha v. Balahamy* [5 N. L. R. 379] it was held that although damages could not be claimed in suits for partition, the plaintiff having claimed damage was liable to make good the stamp duty in respect of that part of his claim.

Jurisdiction of Courts of Requests.

Suits under the Partition Ordinance may be instituted in Courts of Requests, provided the value of the

property to be partitioned or sold is not in excess of the limit of the jurisdiction of the court [Ord. No. 12 of 1895, sect. 4].

Acquisition by Government of land for public purposes.

We have already noticed the right of Government, under the Roman-Dutch Law, to take away from any private person, when necessary for the public good or for public use, an estate wholly or partly, or buildings or lands, adequate compensation being paid to the owner for the acquisition. In Ceylon, Ordinance No. 3 of 1876 [amended by Ordinance No. 6 of 1877 and Ordinance No. 3 of 1883] makes provision for the acquisition of land for public purposes and for determining the amount of compensation to be paid on account of such acquisition.

Governor may direct Surveyor-General to report on land to be acquired.

Whenever it appears to the Governor that land in any locality is likely to be needed for any public purpose, he may direct the Surveyor-General or other officer, generally or specially authorised by him, to examine the land, and report whether it is fitted for such purpose. The person directed may then enter upon the land, survey it, take levels, mark boundaries, and do other acts necessary to ascertain whether the land is adapted for the purpose aforesaid [sect. 4], the owner being entitled to be paid for all necessary damage that may be thus done to the land [sect. 5].

Indian Land Acquisition Act.

Section 4 of our Ordinance is very nearly the same as section 4 of the Indian Land Acquisition Act [Act No. 1 of 1894], except that the power herein given to the "Governor" is there given to the "Local Government." The Indian Act does not, however, authorise acquisition on the strength of the fact that the land intended to be acquired appears to the Local Government "to be likely to be needed for any public purpose." It goes on to provide [sect. 6] that "whenever it appears to the Local Government that any particular land *is needed for a public purpose, &c.* a declaration shall be made to that effect under the

signature of a Secretary to such Government or of some officer duly authorised to certify its orders;" and after this declaration proceedings might be taken for the acquisition of the land. So that, under the Indian Act, the mere fact that it appears to the Local Government that land is "likely to be needed" for any public purpose is justification only for entering upon and surveying and taking levels of the land and doing the other things emmerated in sub-sections (*a*) to (*f*) of section 4 of our Ordinance. To justify proceedings for acquisition, the Local Government must further decide that the land is actually needed [not merely "likely to be needed"] for a public purpose. The declaration referred to above under the Indian Act is made by it conclusive evidence of the fact that the land is needed for a public purpose. This provision in the Indian Act implies one of two things—that the Legislature, by providing that the declaration referred to above should be conclusive evidence that the land sought to be acquired is needed for a public purpose, intended that no such presumption was to be gathered from section 4; or that the words of section 4, involving as they do an opinion as to a mere future possibility, implied that the fact that the land was "likely to be needed for a public purpose" was not to be questioned or challenged when once it was declared thereunder that it appeared to the Local Government that the land was likely to be so needed. This latter view would appear to be the more correct, and the effect of its application to section 4 of our Ordinance would be that where, under that section, the Governor declares that land in any locality appears to him "to be likely to be needed for any public purpose," the declaration is conclusive evidence of its contents, and is sufficient authority [not subject to be challenged by any claimant of the land referred to] for proceedings for its acquisition.

Conclusive evidence of the fact of land being required for public purposes.

Governor's declaration as to land being likely to be needed for public purpose is conclusive evidence of that fact.

On the report of the person directed as aforesaid the Governor, with the advice of the Executive Council, may direct the Government Agent to take order for the acquisition of the land [sect. 6].

Governor may direct Government Agent to take order for the acquisition of the land.

The requirement of this section as to direction by the Governor must be strictly complied with; otherwise the District Court will have no jurisdiction. A letter from the Colonial Secretary to the Government Agent with a plan accompanying it, authorising the Government Agent to take steps for the acquisition of the land referred to in the letter, is insufficient as a direction required by this section [*Saunders v. Silva*, 8 S. C. C. 187]. A direction cannot be given to acquire a house or building without the ground on which it stands [*Saunders v. Abeyratna*, 1 C. L. R. 71].

Form of direction by Governor.

Building without ground cannot be acquired.

The Government Agent, on the receipt of the Governor's direction aforesaid, is required to cause notice to be published in the *Gazette* and to be posted on the land or as near thereto as possible in the English, Sinhalese, and Tamil languages requiring all persons interested to appear before him at the time and place mentioned in such notice, and to state to him the nature of their interests and particulars of their claims to compensation [sect. 7].

Notices by Government Agent.

On the day fixed the Government Agent should inquire summarily into the value of the land, and determine the amount of compensation, and tender the same to the persons interested who have attended in pursuance of the notice [sect. 8].

Inquiry by Government Agent.

The tender mentioned in this section is a condition precedent to any reference to court, and should be averred in the libel of reference. If the Government Agent agrees with the claimants as to the amount of compensation, he cannot, in making a reference in consequence of the claimants not being agreed among themselves as to their respective interests in the land, re-open the question of the amount of compensation. If the

Tender, a condition precedent to reference.

Government Agent, when compensation is agreed to, cannot re-open that question in making reference.

Government Agent does not agree with the claimants as to the amount of compensation, then, in referring that matter to the court, he cannot refer with it any question as to the respective interests of the claimants in the land ; but the court may, if a dispute arise among the claimants after it has determined the amount of compensation on a reference solely as to compensation, adjudicate upon the respective rights of the claimants to the amount so determined [*Elliott v. Podihamy*, 2 C. L. R. 152 ; 1 S. C. R. 349].

How compensation is to be determined.

In determining the amount of compensation the Government should take into consideration the matters mentioned hereafter in section 21 of the Ordinance, and should not take into consideration those mentioned in section 22 [sect. 9].

Agreement as to amount of compensation.

If the Government Agent and the persons interested agree as to the amount of compensation, the agreement should be recorded in writing and signed by the parties ; and the Government Agent should make his award in pursuance thereof. Such award is conclusive evidence as between the parties of the value of the land and the amount of compensation allowed for the same [sect. 10].

Reference to Court.

If no claimant attends, or if the Government Agent considers that further inquiry as to the nature of the claim ought to be made by the District Court, or if any person who the Government Agent has reason to think is interested does not attend, or if the Government Agent cannot agree with the person interested and attending as to the amount of compensation, or if upon the inquiry any question as to title or rights to the land or interests therein arises between or among two or more persons, the Government Agent should refer the matter to the determination of the District Court [sect. 11].

Where notice of intended acquisition had been given to the defendant, and he had informed the Government

Agent that the land belonged to his deceased father, and that he [the defendant] would neither accept compensation nor have anything to do in the matter, it was held that the Government Agent should have treated the case as one in which no claimant had appeared [*Noyes v. Mohamado*, 2 Br. 364].

After the Government Agent has made an award as aforesaid or a reference to the court, and has notified the same to the Governor, the latter may, with the advice of the Executive Council, direct that the land be taken possession of by some officer of the Crown for and on behalf of His Majesty. On a certificate in the form A in the schedule to the Ordinance being signed by such officer, the land vests absolutely in His Majesty free from all incumbrances [sect. 12]. Land to be taken possession of after reference.

In making a reference as aforesaid the Government Agent should state for the information of the District Court in writing under his hand (*a*) the situation and extent of the land; (*b*) the names of the claimants or others who he has reason to think are interested; and (*c*) the amount awarded for damages under section 5, the amount of compensation tendered or, where no claimant has attended or has shown that he is entitled to the compensation, then the amount which the Government Agent is willing to give to the person interested [sect. 13]. Contents of libel of reference.

The document of reference must be framed in very much the same way as an ordinary plaint, alleging the material facts leading up to the making of the reference [*Government Agent, Western Province, v. Ponnammah*, 2 S. C. C. 159]. It is not necessary to allege in it that the Surveyor-General examined the land and reported to the Governor that it was needed for the purpose mentioned in the reference [*Bailey v. Ferdinandus*, 3 N. L. R. 356]. Reference to be similar to ordinary plaint.

The Court should thereupon, after issuing notices as required by the Ordinance, decide, with the aid of assessors to be nominated and summoned as provided Notices to be issued by Court.

by the Ordinance, the question as to the amount of compensation to be awarded [sect. 14 *et seq.*].

Question as to jurisdiction to be decided by Judge.

The assessors must consider the questions of law raised conjointly with the District Judge, but where the legal point raised refers to the jurisdiction of the Court, the District Judge, even after the appointment of assessors, is the proper authority to decide the question [*Bailey v. Ferdinandus*, 3 N. L. R. 356].

Different methods of valuing the property acquired.

The proper method of valuing the land is to consider (1) the situation of the property; (2) the best use to which it can be put; and (3) the use to which property immediately adjoining it is put; and in considering the question of the best use to which the property can be put, the past history of the house and its neighbourhood will be of use [*Ibid.*].

Witnesses to give reasons for opinions.

Witnesses who give evidence at the trial must give their reasons for their opinions as to the value of the property, otherwise the opinions are worthless. Evidence of the amount paid for other lands in the vicinity merely raises a presumption as to the value of the land sought to be acquired, and may be far from conclusive. Assessment in Municipal books is also unreliable [*Government Agent, Southern Province, v. Hassen*, 2 Br. 37]. On this question of appraisement Lawrie, J., in *Ellis v. Fernando* [3 N. L. R. 335] expressed the opinion that it was fallacious to determine the market value of a house by what another house in the neighbourhood fetched, because the one might have advantages or disadvantages which the other wanted, such as difference of view, light, air, and drainage, and of the fashion and popularity of the road or street in which they were situated. Rental was a better test of value than price obtained in the neighbourhood, but the number of years' purchase varied according to the money market, or according to the supply and demand for land as contrasted with other securities. Again, in the case of *Government Agent, Badulla, v. Cornelis* [3

Br. 27] the following opinions were expressed. Withers, J.—"In actions brought under Ordinance No. 3 of 1876 the chief thing to be considered in determining the amount of compensation to be paid is the market value of the land sought to be acquired at the time of the assessment, *i.e.*, when the amount was tendered. The value of any given land depends on its extent, situation, relative position, and its adaptability for any particular use. This value may again be affected by the use made of the property immediately adjoining it. Given all the surrounding circumstances, what is the best use to which the land can be put is a fair question to be asked in a case of the kind. Then, what are the tests of the market value of a piece of land? One that naturally suggests itself is the price which any one would give for it at a public auction. Another test is the price given at recent sales for pieces of land similarly situated, but the value of this test altogether depends on the circumstances attending such sales. Assistance may be had from an experienced valuer. The rent and the rate of interest are also material for computing this market value." Lawrie, J.—"To arrive at the market value the best guide is to ascertain the price paid for the land when it was acquired by the claimant. The next test of market value is the price paid for property in the same town or village. The annual rental multiplied by ten is not a fair test of market value. The Ordinance gives no countenance to such a mode of ascertaining market value. It can be easily shown that the price of land in the open market has often nothing to do with the rental obtained at the date of sale."

Opinions on the question of market value.

It is wrong to value the land, the trees, and buildings standing on the land separately and then add the several amounts together, nor is it correct to value a building by reckoning the quantities of the materials and the work employed in building it [*Government Agent, Western Province, v. Dias*, 3 Br. 131].

How assessors' opinions are to be given.

In *Government Agent, Southern Province, v. Silva* [3 N. L. R. 235] it was held that the assessors should give their opinions orally, and such opinion should be recorded by the judge, so that the appeal court might have before it the independent opinion of each assessor. As to the market value of a house, the judges thought that it did not depend on the money expended on it, nor on the difficulties which had to be overcome in building it; and as to land, its market value depended on the extent, situation, relative position, and its adaptability for any particular use; also upon the rent and rate of interest obtaining in the district; and, further, that among the tests of the market value of a piece of land were the price which any one would give for it at a public auction and the price given at recent sales for lands similarly situated.

Tests on question of "market value."

The following tests and authorities on the question of "market value" are collated by Mr. Beverley, late Judge of the High Court of Calcutta, in his work on the Indian Land Acquisition Acts [p. 32]—In considering this question, the remark of Lord Truro in *East and West Indian Docks and Birmingham Junction Railway Co. v. Gattke* [20 L. J. Ch. 217] should be borne in mind—" These Acts are to be liberally expounded in favour of the public, and strictly expounded as against the Government or Company taking the land." The market value is the price which a willing vendor might expect to obtain in the open market from a willing purchaser. The recognised modes of ascertaining the market value are—(1) if a part or parts of the land taken up has or have been previously sold, such sales are taken as a fair basis upon which, making all proper allowances for situation, &c., to determine the value of that taken; (2) to ascertain the nett annual income of the land, and to deduce its value by allowing a certain number of years' purchase of such income, according to the nature of the property; (3) to find out

the prices at which lands in the vicinity have been sold and purchased, and making all due allowance for situation, to deduce from such sales the price which the land in question would probably fetch if offered for sale to the public [*Case of Munji Khetsey*, I. L. R. 15, Bom. 279]. At the same time it is obvious that neither the cost of the same land to the owner, nor the price paid for similar land in the neighbourhood, can be more than a factor in determining the value of the particular land taken. In England the value is generally proved by the evidence of experts who are acquainted with and speak to the conditions and capabilities of the actual land in suit. Auction sales, as a rule, are not a fair test of the true market value, the prices obtained being sometimes above, but generally much below, the real value of the property, because the title is often subject to doubt, and the sale takes place compulsorily without particular regard to the convenience of possible purchasers. In England, the principle laid down is that the compensation shall be assessed according to the value of the land to the owner; and the question to be considered is, what the person from whom the land is taken will lose by having it taken from him. This is not to be determined, as a mere matter of course, by the cost of the land, but the cost may be an element in the assessment of value, and so too may be money *bonâ fide* spent in improvements by him. The probable use to which the land may be put by him is necessarily an element to be taken into consideration, that is, its potential value should be considered, for its value to him is enhanced, by the probability of a more profitable future use. Thus, he is entitled to have its price fixed in reference to the probable use which will give him the best return, and if the probable use from which the best return may be expected is special in its character, the value is fixed on the principle of this "special

adaptability." Accordingly, it was held that certain land was rightly treated as possessing an enhanced value because of its capability of being used as a reservoir, just as agricultural land would, by the extension of a town, probably acquire an enhanced value as building land. But the probable use to which the land may be put after its acquisition, and any increase of value therefrom must be entirely excluded [Cripps' Law of Compensation, 4th Ed. 95, 96, 101, 107, 108].

In India it is the market value that must be ascertained, and this term, though it has reference to what a purchaser would give, has been interpreted according to principles very similar to those laid down in English Law as just stated. Thus, in the leading case, *Premchand Burral v. Collector of Calcutta* [I. L. R. 2 Cal. 103] it was held that the fairest and most favourable principle of compensation to the owners was to inquire "what is the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it." In that case Garth, C.J., [Macpherson, J., concurring] said that to capitalise the present rental of the property at so many years' purchase was not always a fair way of arriving at the market value. "When Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the price of similar property in the neighbourhood without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. Of course, if it can be satisfactorily shown that the purposes to which the land is applied are as productive as any other to which it is applicable, or that the price given by the owners is its full market value, it would

be very just to assess the compensation upon that basis." In calculating the value of the land as laid out to the best advantage, the cost of laying it out would, apparently, have to be taken into consideration on the other side. Moreover, customs, habits, and prejudices would require attention, and the law of supply and demand should be regarded, for what is the most lucrative disposition theoretically may not be always actually realisable. It was also pointed out in the case cited above that if, in order to apply the land to much more profitable use, it is necessary to pull down buildings existing on it, all that the owners could obtain for those buildings would be, not their value as standing structures, but the price of the materials as old materials, because until they are pulled down the land could not be applied to that use.

The principle laid down in this case was approved in *Collector of Poona v. Kashinath Khasgiwala* [I. L. R. 10 Bom. 585], where it was admitted that the most lucrative and advantageous way in which the owner could dispose of the land was by laying it out for building purposes. "The question then is, what would be its market value if so laid out; and the most reliable evidence on that question must be the rates per square foot at which similar building sites in the neighbourhood have recently been sold." Similarly, in the case of *Munji Khetsey* [I. L. R. 15 Bom. 279] it was held that in the neighbourhood of a town where building is going on, it would be unfair to assess the value of the land upon its present income, if there is a fair probability of the owners being able, by reason of its situation, to sell or lease the land for building purposes. On the other hand, Couch, C.J., said—"The market value is not to be estimated by the costs of what may have been done to preserve the land. It is not to be estimated by the money the owner may have spent in improving the land; for a man might spend a

great deal of money on improvements, and yet the result might be that the market value was not increased to the amount which he had thought fit to spend" [*Collector of Hooghly v. Ray Kristo Mookerjee*, 22 W. R. 234].

The number of years' purchase at which the rent should be capitalised will depend on various circumstances, such as the locality and the demand for land, the prevailing rate of interest, and the price of Government securities. Every case must depend on its own circumstances, on the evidence given, and the nature of the property. The number of years' purchase which it would be right to allow with regard to one sort of property might not be a fair allowance for other kinds of property, and no rule has been laid down as to the number of years' purchase which ought to be allowed [*Heysham v. Bholanath Mullick*, 11 B. L. R. 236].

In *Collector of Hooghly v. Mookerjee* [22 W. R. 234] the income yielded, where the land was occupied, was taken into account with a view to consider the number of years' purchase to be allowed for the land; and in estimating the value of godowns yielding rent, a deduction was made for the chance of some of them being unoccupied for part of the year as well as for periodical repairs and Municipal taxes.

In *Secretary of State for India v. Shanmugaraya Mudaliar* [L. R. 20 I. A. 80; I. L. R. 16, Mad. 369] the Government were desirous of acquiring under the Act a certain granite hill on the seabeach in the vicinity of Madras, out of which are constructed the famous seven pagodas of Mahabalipuram, and the question arose as to the principle upon which the compensation should be assessed. The Privy Council held that the right, if not the only, course of proceeding was to estimate the rent at which possibly the whole plot might be leased on the basis of how much rent a portion

of the plot when leased for quarries had in fact obtained for the Zamindar ; and that the purchase money might be properly calculated at twenty-five years' purchase of such rent. It was also held that the temples and carvings had no market value, as they never had been, and were never likely to be, a source of any income.

Where the land has no present value, the future use to which it will be put after acquisition cannot affect its present value. Thus, in *Stebbing v. Metropolitan Board of Works* [L. R. 6 Q. B. 37], where the plaintiff was rector of three parishes in London, in the churchyards of which burials were prohibited by order in Council, and where the defendants were authorised to take portions of the churchyards for the purpose of forming a new street, Cockburn, C. J., observed—" It is intended that he [the person from whom the property is taken] shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the person acquiring it. The plaintiff, as rector, could never have parted with these churchyards, and therefore to him they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased value, but that is no loss to the rector."

Claim of lessee.

The Court has to adjudicate on the claims of even lessees, because a lessee is a person interested in the land, and can claim his share of the compensation where the value of the property acquired represents the interests of the lessor and the lessee [*Ellis v. Dias*, 5 N. L. R. 281]. The Court may further give directions as to the purposes for which money paid to the different claimants is to be applied. In the case of the *Government Agent, Northern Province, v. Pararajasingham* [6 N. L. R. 54] money had been brought into Court as the value of a land belonging to a Hindu temple,

Directions as to how money paid out is to be applied.

and several parties claimed the proceeds, each alleging himself to be a trustee of the temple; and it was held that the Court should take care that the money representing the value of glebe land was not expended for mere temporary purposes, but in some way that would permanently benefit the charity.

Matters to be taken into consideration in awarding compensation.

In determining the amount of compensation the judge and assessors should take into consideration (1) the market value at the time of awarding compensation; (2) the damage, if any, sustained by the person interested by reason of severance of the land acquired from his own land; (3) the damage, if any, sustained by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his earnings; and (4) the reasonable expenses that may have to be incurred by the person interested by reason of his having to change his residence in consequence of the acquisition [sect. 21].

Matters that should not be taken into consideration.

The judge or assessors should not take into consideration the following matters—(1) the degree of urgency which has led to the acquisition; (2) any disinclination of the person interested to part with the land; (3) any damage sustained by him which, if caused by a private person, would not render such person liable to a suit; (4) any damage which after the time of awarding compensation is likely to be caused by or in consequence of the use to which the land acquired will be put; (5) any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired; (6) any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or (7) any outlay or improvements on the land acquired made, commenced or effected with the intention of enhancing the compensation to be awarded therefor [sect. 22].

The damage arising from the use to which the land taken is to be put cannot be considered [*Templer v. Elphinstone*, 4 S. C. C. 45].

As to damage on account of severance, the points to be noted are (1) that the land acquired is severed from the other land belonging to the person interested, (2) that the severance causes him damage, and (3) that the damage must be sustained at the time of awarding compensation [see Beverley, p. 38]. As regards the holding of the land acquired and the other land together, it has been laid down in England that when the other land is held by the same owner and for the same common object as the land taken, the lands are held together within the meaning of the Lands Clauses Act, 1845, sect. 49 [*Holt v. Gaslight and Coke Co.*, L. R. 7 Q. B. 728]. In other words, where several pieces of land owned by the same person are, though not adjoining, so near together and so situated that the possession and control of each gives an enhanced value to all of them as one holding, they are lands held together [*Cowper Essex v. Acton Local Board*, 14 App. Cas. 167].

There must be damage to the other land, arising out of the severance; any other damage would apparently fall more properly under the third sub-section, but the two kinds of damage are not always capable of clear separation [Bev. 38]. It was held in *In re Stockport, &c., Railway Co.* [33 L. J. Q. B. 251] that the owner was entitled to compensation, where a railway company took some land and proposed to make their railway so close to a cotton mill belonging to the same owner that because of the proximity of the railway and the danger of fire from the trains the building was less suitable for a cotton mill, and could only be insured at an increased premium. In deciding whether part of a property can be taken without material detriment to the remainder, the Court should take into consideration all the circumstances of the case, including the sufficiency of any

proposed new access [*Gonty v. Manchester, Sheffield, &c., Railway Co.* (1896), 2 Q. B. 439; Cripps' Law of Comp. 133, 134, 182]. The measure of compensation is the full consequential loss which the owner has sustained by reason of the severance of the land taken from the other lands [Bev. 39].

The depreciation in value of the land damaged is to be assessed not only in reference to the loss occasioned by the construction of the authorised works, but also in reference to the loss which may probably result from the nature of their user. In other words, the use for which the works have been constructed is an element in determining the amount of compensation so far as such use tends to depreciate the value of the lands which are affected [*Cowper Essex v. Acton Local Board*, 14 App. Cas. 167].

As to the acquisition injuriously affecting other property, in the case of *Ricket v. Metropolitan Railway Co.* [L. R., 2 H. L. 175] Lord Cranworth said—"Both principle and authority seem to me to show that no case comes within the statute unless when some damage has been occasioned to the land itself in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration."

If the physical access from land to a pulic highway or navigable river on which the land immediately abuts is taken away or rendered less convenient, and the value of such land is depreciated thereby, the owner is entitled to compensation [*Reg. v. Eastern Counties Railway Co.*, 2 Q.B. 347; *North Shore Railway Co. v. Pion*, 14 App. Cas. 612, 620]. For other cases in point see Bev. 44 *et seq.*

When the person interested has made a claim to compensation pursuant to any notice mentioned in section 7 or in section 14, the amount awarded to him should not exceed the amount so claimed or be less than the amount tendered by the Government Agent under section 8 or the amount which the Government Agent has offered to give under section 13. When the person interested has refused to make such claim, or has omitted without sufficient reason to make such claim, the amount awarded to him may be less than, but in no case exceed, the amount tendered or offered as aforesaid. When the person interested has omitted for a sufficient reason to make claim, the amount awarded should not be less than, but may exceed, the amount tendered or offered as aforesaid [sect. 23]. Amount to be awarded as compensation.

The costs of all legal proceedings, when there has been a reference to Court, are to be taxed by the Court. When the amount awarded does not exceed the sum tendered by the Government Agent or the sum which he has offered under section 13, such costs should be paid by the person who has contested the amount. When the amount awarded exceeds these sums the costs should be paid by the Government Agent. As between several persons interested the Court awards costs in such manner as may appear just [sect. 29]. Costs of legal proceedings.

The Government Agent is entitled to his costs if the the amount awarded by the Court does not exceed the amount tendered by him [*Ellis v. Dias*, 5 N. L. R. 281].

When there are several persons interested who agree in the apportionment of the compensation, the particulars of such apportinment should be specified in the award. As between such persons the award is then conclusive evidence of the correctness of the apportionment [sect. 33]. Where claimants disagree as to apportionment.

When the amount of compensation has been settled under section 10, if any dispute arise as to the apportionment of the same or any part thereof, the Reference to Court of disputes among claimants.

Government Agent should refer such dispute to the decision of the District Court [sect. 34]; and when a reference is so made, or the amount of compensation has been settled by the Court, and there is any dispute as to the apportionment thereof, the District Judge sitting alone should decide the proportions in which the persons interested are entitled to share in such amount. The decision is subject to appeal [sect. 35].

When compensation is once paid, no further claim against Government.

When payment of compensation is made by the Government Agent according to the ultimate decision of the Court, no further claim can be maintained against Government in respect of compensation for the land acquired at the instance of any person whomsoever. The person lawfully entitled to such payment, however, has his right to recover the money from the person receiving the same [sect. 36].

Land subject to *fidei commissum*.

When the land taken is subject to any entail, settlement, or *fidei commissum*, the compensation payable in respect thereof is subject to the same entail, settlement, or *fidei commissum*, so far as the different nature of the property admits. The compensation in this case should be paid into Court to abide its further orders as to its disposal or investment. The District Judge may further, in any case, require the compensation payable in respect of any land to be paid into Court to abide its further orders [sect. 37].

Additional percentage to be paid by Government.

In addition to the amount of compensation finally awarded the Government Agent may in consideration of the compulsory nature of the acquisition pay 10 per cent. on the market value mentioned in section 21. When the amount of compensation is not paid either to the persons interested or into Court, interest thereon and on the percentage aforesaid is payable at 6 per cent. from the time of taking possession of the land acquired. Costs payable to the Government Agent by the person interested may, however, be deducted from such amount and percentage [sect. 38].

The provision of the Indian Act as to additional compensation is as follows—" In addition to the market value of the land, as above provided, the Court shall in every case award a sum of fifteen per centum on such market value, in consideration of the compulsory nature of the acquisition " [sect. 22, sub-sect. 2].

In any district in which the Government Agent or Assistant Government Agent is also District Judge he cannot act as judge in proceedings under the Ordinance [sect. 39]. When Government Agent is District Judge.

A part of any house, manufactory, or building cannot be acquired under the Ordinance, if the owner desire that the whole of such property should be acquired [sect. 44]. Part only of house cannot be acquired.

Right of property is acquired by (1) Occupancy; (2) Accession; (3) Prescription; and (4) Specification and Confusion. These will be dealt with later. Delivery or Conveyance is also mentioned by some writers as a mode of acquisition of the right of property. Movable property passed merely by delivery thereof or of its symbol, as by delivery of the keys of the store or warehouse where it was deposited. The delivery, however, of movable property did not transfer the title or dominion. Either the purchase money had to be paid or the purchase made expressly on credit [V. d. L. 1. 7. 2]. How right of property is acquired. Delivery or conveyance.

In Ceylon, Ordinance No. 11 of 1896 regulates the rights and liabilities arising from the sale and delivery on sale of goods, a *casus omissus* being governed by the English Law.

In the case of immovable property the title did not pass under the Roman-Dutch Law unless the conveyance or transport was made before the judge of the place where it was situate, and the government duties of two and a half per cent., with the addition of one-tenth, were paid [V. d. L. 1. 7. 2]. As to sales of immovable property in Ceylon see Book II., chap. I., sect. 1, sub-sect. 6 *infra*. How title to immovable property passed.

Registration of old instruments of title.

Ordinance No. 6 of 1866 made provision to compel the registration of old deeds and other instruments of title.

Persons holding or claiming title under deeds, sannases, olas, or other instruments on which title to land or other immovable property was founded, which bore date on or before the 1st February, 1840, were required to produce the same before the Registrar of lands for the district within which such persons resided on or before the 31st December, 1867. The Governor is given the power to extend, if necessary, the time with the advice of the Executive Council [sect. 2].

Copy of document to be kept in Registrar's office.

The Registrar was thereupon bound to cause an exact copy of the document to the made and preserved in his office, the original being returned to the owner with his indorsement to show that the same was produced before him and the date of production [sect. 3]. The requirement here as to taking exact copies may be dispensed with by the Governor by Proclamation in certain districts, and then only the substance of the document as may be required by the Proclamation may be taken down by the Registrar [Ord. No. 15 of 1867, sect. 1].

Lists of registered documents to be made by Registrar.

The Registrar was required to cause a list in duplicate to be made monthly of all documents produced before him as aforesaid, and to transmit one list to the Registrar-General of Lands and file the other in his own office, and a general list of all such deeds for convenience of reference was required to be preserved in the office of the Registrar-General and that of the District Registrar [sects. 4 and 5].

Where document is in possession of person other than person claiming interest.

If any person claim interest on any such document as aforesaid, but be unable to produce it owing to its being in the possession of another who refuses to part with it, he may inform the Registrar of the same, who may notice the person who has possession of the document to produce it. His failure to do so rendered him liable to fine [sect. 6].

Unregistered document to be received in evidence.

After the 31st December, 1867, no deed, sannas, ola, or other document may be received in evidence in any civil proceeding in any court for creating, extinguishing, &c., any right or obligation, unless such document is registered as aforesaid. If, however, the court is satisfied that the document was not registered owing to the holder's absence from the Island or to his being under some legal disability or some other causes utterly beyond his control, it may receive the document in evidence. The document, though registered, may be questioned on other grounds [sect. 7].

Ordinance not to affect documents annexed to other instruments duly registered.

The Ordinance does not affect deeds, sannases, olas, or other instruments annexed to other deeds or instruments of title bearing date subsequent to the 1st February, 1840, which have been *boná fide* transferred and registered as required by law [sect. 8].

How right of property is lost.

The right of property may be lost with or without our consent. With our consent, by delivery or conveyance to another, or by its entire abandonment, provided the intention to abandon clearly appears. Thus, for example, in cases of stormy or bad weather the throwing of goods overboard to lighten the vessel does not amount to abandonment or relinquishment of the right of property. We lose our right of property against our will when it is taken in execution, or by order of the higher power for the advantage of the community. The latter, however, cannot, as observed before, take place without reasonable compensation. In like manner by prescription of time. But this is not effected by the mere loss of possession, although we are ignorant what is become of the property, unless it was of that nature that it was originally no one's property; as, for example, beasts of the chase, over which we lose our property after capture, when they escape [V. d. L. 1. 7. 2]. Other means by which right of property is lost may be gathered from what is said on the subject of the acquisition of such right.

SECTION I.

Occupancy.

Occupancy.

Occupancy,* which is one means of acquiring the right of property in a thing, is the simple taking of the thing. To this title it is requisite that the thing belongs to nobody, or else a theft is committed. Under this title may be classed (1) the right of the chase in wild beasts; (2) the right of fowling; (3) the right of fishing in the sea; and (4) the finding of unowned goods or of goods the property in which has been abandoned by the owner [V. d. L. 1. 7. 2; V. L. 2. 3. 3].

Right of the chase in wild beasts.

Every one is at liberty to pursue the chase on his own grounds [V. d. L. 1. 7. 2].

Wild animals are such as have never yet been captured, or, having once been captured, have recovered their former liberty [Grot. 2. 4. 2, 3 and 2. 32. 4]. Animals are understood as having recovered their liberty when their owner has lost sight of them. Such animals then become the property of any person by possession, that is capture, unless such capture is prohibited by law [Grot. 2. 4. 4, 5].

Domestic animals allowed to roam at large.

In *Miguel v. Arumokottar* [Ram. Rep. 1872–1886, 5] the plaintiff owned two domestic cows which, five or six years before action, had strayed from his premises and had roamed ever since uncontrolled in some plains several miles from the plaintiff's premises. The cows produced two heifers which, with their calves, herded and roamed at large with the uncontrolled cattle, until such heifers and calves were caught by the defendant and claimed by him by right of occupancy; and it was held that the plaintiff, having done

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* See p. 237.

no act to disclaim his ownership of the animals, remained the owner of the two cows and all their offspring, and that title by occupancy could only be acquired in animals *feræ naturæ* and *mansuefacta*, but not in those that are *mansueta*, such as domestic animals. Creasy, C.J., in the course of his judgment observed as follows—"It is unquestionable that before the cows strayed away they were the plaintiff's property, and they were naturally and in fact tame and domestic animals—*mansueta* to all intents and purposes. This being the case, the plaintiff did not lose his property in them, however far they strayed, and however thoroughly they may have lost *animus revertendi* to his fold. The doctrine of the *animus revertendi* applies exclusively to animals that are *mansuefacta*, that is, animals which are naturally and originally wild, but which have been practially reclaimed, and made tame by custom. When such creatures as these stray away, and lose all *habit* of returning [whence it is inferred that they have lost all *intention* of returning] their temporary owner's property in them ceases, and they become the property of the first person who takes them. But with regard to creatures naturally tame [*mansueta*] the case is different, and their owner's property in them continues, however far they may stray."

Animals *feræ naturæ* and *mansuefacta* and those that are *mansueta*.

If one person starts game and another catches it, the latter acquires the ownership of the same, although in the olden time he became liable to penalties for hunting unfairly [Grot. 2. 4. 31].

Although wild quadrupeds are, generally speaking, classed under wild animals, rabbits kept in a warren are considered to be the property of the keeper, and they may not be caught by others [Grot. 2. 4. 29].

Right of fowling.

As to the right of fowling, what has been observed on the right of chase is equally applicable to it.

One who captures birds not only on his own land, but (saving to every man the right to prohibit others from coming on to his land) even on that of another, becomes their owner. Consequently, whenever a person sets snares or traps, whatever is caught therein becomes his property [Grot. 2. 4. 9].

Birds which fly about, such as pigeons, are considered private property as long as they show any intention of returning [Grot. 2. 4. 13].

Local laws for the protection of wild animals.

Ordinance No. 18 of 1886 makes provision for the protection of wild birds in this Island ; Ordinance No. 6 of 1893 provides for the protection of certain birds, beasts, and fishes not indigenous to this Colony, but which have been or may be introduced into it ; and Ordinance No. 10 of 1891 makes provision for the prevention of the wanton destruction of wild elephants, wild buffaloes, and other game in this Island.

Property in bees.

Bees are wild and are not considered as private property, until they have settled in the hive, and they continue such private property until they have flown away so far that there is no hope of their returning. Before they have become such property and after they have ceased to be such, they and their combs become the property of the first captor [Grot. 2. 4. 15].

Right in geese and poultry.

Geese and other poultry are considered as domesticated. Consequently they may not be captured, and any one capturing them becomes guilty of theft [Grot. 2. 4. 16].

Right of fishing.

The right of fishing in the sea is common to all. So also is the right of fishing in public rivers, streams, and waters, except where restricted by local laws and regulations [V. d. L. 1. 7. 2 ; Grot. 2. 4. 17, 18] ; but fish contained in a man's private tanks or fish ponds are considered as his private property, and may not be caught [Grot. 2. 4. 24]. The right to fish on the coasts of Ceylon is common to everybody. The fact that one particular kind of net has been used for a large

number of years at any place does not prevent the use there of any other kind of net [*Don Louis v. Veyado*, Ram. Rep. 1872–1876, 111].

In Ceylon, the Governor may, with the advice of the Executive Council, from time to time by proclamation, prohibit the use, in the sea coast or in any river, canal, lake, or inland water of this Island, of certain kinds of nets to be in such proclamation specified, or may restrict their use to certain places, or attach such conditions to their use as to him may appear expedient. The use of such nets contrary to such prohibition is an offence punishable with fine and imprisonment. [Ords. No. 19 of 1866 and No. 13 of 1887.]

Unowned goods, newly discovered islands, &c.

As to unowned goods—shells and precious stones found on the seashore, newly discovered islands, movable property of the enemy of the State, wrecked property, and treasure trove belong to the finder [V. d. L. 1. 7. 2; Grot. 2. 4. 33–38]. The immovable property of the enemy goes to the State [Grot. 2. 4. 35].

Treasure trove.

As to treasure trove or buried or concealed treasure, some maintain that it belongs to the lord of the land; others (and this appears to be the opinion of the later writers) that whoever finds hidden treasure in his own property becomes the owner of it, but if he finds it accidentally outside his own land, half belongs to the owner of the land and half to the finder according to the Roman Law, which also provided that whatever is accidentally found in consecrated ground or in a tomb belonged to the finder solely [Grot. 2. 4. 38; V. d. L. 1. 7. 2]. The States have occasionally pretended to some right in treasure trove [V. d. L. 1. 7. 2].

Law as to treasure trove in Ceylon.

Ordinance No. 17 of 1887 provides against the concealment of treasure trove found in this Island. All treasure trove in Ceylon is the absolute property of His Majesty, and any person finding the same is not as of right entitled to any portion of it [sect. 2].

Finder must report to the nearest Magistrate.

Every person finding treasure trove or who has information of the finding of it, and every person to whose possession treasure trove has in any way come, should report the fact of such finding, and surrender the treasure trove in his possession to the nearest Police Magistrate, or, if no Magistrate resides within ten miles of the place in which such finding has occurred, then to the nearest chief headman or to the nearest police officer not under the rank of sergeant. Such headman or police officer must then give information forthwith of such report, and deliver possession of any treasure trove which may have been surrendered to him to the nearest Police Magistrate [sect. 3].

Magistrate to make inquiry.

It is the duty of the Police Magistrate to inquire into the matter of such report in order to ascertain (*a*) what was the treasure trove actually found, (*b*) who were the finders, and (*c*) whether any offence has been committed under the Ordinance, and if so, by whom [sect. 3].

Right of finder to receive value.

The finder or other person to whose possession treasure trove has come, on complying with the provisions of section 3 and on voluntarily surrendering the treasure trove as aforesaid, and on such treasure trove being retained by the Ceylon Government, is entitled to receive from the Government payment of a sum of money equivalent to the value of the material of such treasure trove, together with an additional one-fifth of such value. The value is to be determined by the Governor in Executive Council [sect. 6].

Antiquities.

It may here be noted that Ordinance No. 15 of 1900 provides for the better protection of antiquities which may be found in the Island. It defines the term in section 2, and makes provision as regards the shares respectively of the Crown, the person in whose land antiquities are found, and of the finder, in antiquities, and as regards the issue of licenses to excavate with the

object of unearthing or of discovering antiquities, the export of antiquities, their accidental discovery, and such other matters.

Abandoned goods.

As to abandoned goods, it must be clear that the owner has abandoned his property in the thing. We cannot, therefore, acquire by occupancy stray beasts or a lost purse of money or other valuables, but are bound by public advertisement to give notice in the newspapers and to the authorities, and to use other means to find the true owner. This rule applies more especially to shipwrecked goods or those found on the seashore. The conversion of these renders us liable to a criminal action. Sailors and other persons who found this property were entitled to place it in security so that the owners could not reclaim it without paying the salvage [V. d. L. 1. 7. 2].

Goods shipwrecked within limits of Ceylon.

As to goods shipwrecked within the limits of Ceylon, Ordinance No. 5 of 1861 makes provision. The principal collector of customs is thereby given the general superintendence of all matters relating to wrecks, and the Governor is given the power to appoint any officer of customs or any other person to be a receiver of wrecks in any district, and to perform such duties as are mentioned in the ordinance.

Articles washed on shore from wrecks.

All cargo and other articles belonging to ships or boats stranded or in distress at any place on the shore of the sea or of any tidal water within the limits of Ceylon that may be washed on shore or otherwise lost or taken from such ship or boat must be delivered by the person into whose possession such property may come to a receiver appointed under the ordinance; and all persons, not being the owners, who find or take possession of wrecks are bound to deliver the same as soon as possible to such receiver [sects. 9 and 16]. In the event of no owner establishing a claim to wreck found in Ceylon before the expiration of a year from the date at which the same comes into the possession

of the receiver, the receiver is bound to sell the wreck, and after deducting from the proceeds all expenses, fees, &c., to deposit the balance in the Treasury to be carried to the account of the consolidated fund constituted by 1 Vic. Ch. 2 [Ord. No. 4 of 1862, sect. 2].

Things lost continue to belong to the owner ; and in Holland, after he had been summoned by the public crier to claim them, they passed, on his non-appearance, to the finder, and not to the Treasury. When wood and timber had been detached and carried away from rafts by the force of the stream, notice had to be given forthwith to the chamber which presided over the particular kind of trade [V. d. K. 189].

Booty in war.

In the distribution of booty acquired in war from the enemy the military and maritime law must be followed. [V. d. L. 1. 7. 2 ; V. L. 2. 3. 9 *et seq.*]

SECTION II.

ACCESSION.

ACCESSION* is another mode of acquiring property. It is the addition made to our property by its natural fruit, increase, or produce, for example, the produce of any cattle, the fruits of any land, &c. [V. d. L. 1. 7. 2; V. L. 2. 4. 1.]

Accession.

A person who is in *bonâ fide* possession of a thing is entitled to the fruits of that thing which have actually been gathered in. In this respect a *bonâ fide* possessor is in the same position as a usufructuary [Grot. 2. 6. 2].

Bonâ fide possessor entitled to fruit gathered in.

A *malâ fide* possessor, however, of another's property does not become owner of its fruits; but such fruits as are found in his possession may be recovered by judicial process, and for those which he has consumed he is bound to make compensation [Grot. 2. 6. 3].

Not so a *malâ fide* possessor.

The privilege attaching to *bonâ fide* possession ceases on commencement of action [*Ibid.*].

The gradual addition made to our lands by the constant ebb and flow of the waters we acquire under the title of *accretion* or *alluvium* [V. d. L. 1. 7. 2].

Accretion or allivion.

By the overflow or drifting of sand the lords of certain wastes in Holland acquired adjoining lands which had for a period of ten years remained unenclosed from the waste, and which had become so completely covered with drift sand as to be exactly like the waste [Grot. 2. 9. 6].

In Holland, by inundation or overflow of water, the Count acquired land which, having been inundated by the sea or rivers, had remained in that state for ten years

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* See p. 237.

and upwards, and again became dry land. Intermittent inundations, which admitted of the owners attending to their lands from time to time, did not deprive them of ownership [Grot. 2. 9. 7, 8].

Inundated lands.

Inundated lands became one with the shore or the beds of rivers, so that they were no longer dry land, but seashore or beds of rivers; and if by deposits of mud they again became dry land, they were no longer the old lands which were lost, but new and unowned lands which, like all other unowned things, had become the property of the Counts [Grot. 2. 9. 9].

Alluvion.

Alluvion of mud or soil, that is, an unusual addition made by the sea or river to the land, became the property of the owners of the land to which the alluvion had been made, each in proportion to the frontage of his land at the place of alluvion.

Piece of land forcibly torn by a river.

A piece of land forcibly torn by a river from one place, and washed up at another remained the property of its former owner, unless the same was neglected by him for some time and became attached to another man's land [Grot. 2. 9. 13].

It had been decided by the Court of Holland that when a *fidei commissary* estate was augmented by alluvion, such augmentation was not subject to the *fidei commissum* [V. d. K. 211].

Sandbanks.

Islands rising in sea.

Sandbanks or islands in rivers belonged to the nearest landholders, and, if there were two equally near the sandbank, it was their common property, and was shared between them, each in proportion to their river frontage. Islands rising in the sea belonged to the first occupier. If a man's land was surrounded by water through a river separating into two branches, and was thus converted into an island, it still remained his property [Grot. 2. 9. 15].

Whoever had the right of alluvion might assist such alluvion by throwing dams, planting stakes, and erecting other works, provided the public navigation and

private rights of fishing on the opposite lands were not injured thereby [Grot. 2. 9. 23].

Accession by the act of man takes place with respect to both movable and immovable property. If a person weaves his own gold into another's cloth, the owner of the cloth becomes the owner of the gold. The weaver, however, if he acted in good faith, may claim compensation [Grot. 2. 10. 4]. Similarly, if one puts a lid to another's jar.

Accession by act of man.

Whatever is planted or erected on the ground of another goes to the proprietor of the ground [V. d. L. 1. 7. 2; Grot. 2. 10. 7; V. L. 2. 5. 2]. It any one builds on his own land with another man's timber or stone, he is considered the owner of the building so long as it continues standing, but he is bound to make compensation. Should it, however, happen to tumble down, the owner of the materials may claim or recover them [Gort. 2. 10. 7]. And if any one builds with his own timber or stone on another man's land, he loses his ownership in the materials, which thereupon go to the owner of the land, but the owner of the land is bound to make him compensation, if he built under the impression that the land belonged to himself or even as usuary of the land, unless indeed the building was erected not for necessary or useful purposes, but merely for purposes of pleasure, in which case the owner of the land has the option of either retaining the building and giving compensation or of allowing the person who built it to remove it. If, however, the person builds *malâ fide*, he is not entitled to claim any but necessary expenses [Grot. 2. 10. 8].

Planting or building on another's ground.

Whatever is sown or planted upon any land, whether by the owner of the land or by another, belongs to the owner of the land [Grot. 2. 10. 9]. This rule applies to plants which have taken root. A neighbour's tree by taking root in my ground becomes mine, and a tree standing midway between two adjoining properties is

Whatever is planted on another's land goes to owner of land.

common to both [Grot. 2. 10. 10]. The remarks as to compensation hold also in favour of the owner of the seed or plant and apply also to his labour, provided he has planted or sown in good faith [Grot. 2. 10. 11].

Bonâ fide possessor's right to fruits.

A *bonâ fide* possessor who is in possession of the property of another by a particular title acquires the fruit by gathering, and is not bound to restore them even to the owner on his appearing [V. d. K. 205].

Meaning of "fruits."

Van Leeuwen says that by being in possession of property which we *bonâ fide* believe to be our own we also acquire, *per consequentiam rei*, the *dominium* of the fruits of such property [V. L. 2. 6. 1]. The term "fruits" denotes whatever the property possessed can annually produce, as all fruits of trees and fruits of the soil; also everything produced by and out of animals, as calves, foals, lambs, bees, chickens, young pigeons, geese, milk, butter, cheese, and the like [V. L. 2. 6. 2]. This possession and enjoyment of fruits are considered to determine whenever, the true owner having claimed his property, full legal process has commenced, and all fruits and profits from that period of time must be restored to him. The fruits are deemed to be an equivalent for the expenses and improvement of the property. If the expense and improvement spent and made by the possessor on the property exceed the value of the fruits which he has enjoyed, he may claim back his expenses and improvement in full, deducting therefrom, however, the fruits enjoyed [V. L. 2. 6. 3].

Malâ fide possessor.

He who possesses property *malâ fide*, well knowing it to belong to another, can derive no profit therefrom, *nemo enim ex suo scelere compendium habere debet*, and must not merely restore the property together with the fruits he has actually enjoyed, but also all that the owner might have derived from the property, the expenses being previously deducted [V. L. 2. 6. 4].

He who has built on another's land of which he was in possession *bonâ fide* may on losing possession recover the *useful* expenses incurred by him even by action [V. d. K. 212]. But a lessee who has built with the consent of the owner may recover only the value of the materials, but cannot on this ground retain the land, although it is bound to him in right of legal mortgage until he should receive the value. If he has built without such consent, he may before the termination of the lease remove that which he has built [V. d. K. 213]. Many authors maintain, contrary to the opinion of Grotius, who has followed the rules of the Civil Law, that a *malâ fide* possessor also may deduct the useful expenses. Their opinion, says Van der Keessel, cannot however be accepted [V. d. K. 214].

Rights of builder on land.

Lessee's right in respect of improvements.

Malâ fide possessor.

Trees planted on a leasehold estate pass with the land. An owner who has not directed them to be planted is not bound to restore the value of them [V. d. K. 215].

A lessee cannot maintain a claim for compensation for improvements in the absence of a special stipulation in the lease, inasmuch as he is not a *bonâ fide* possessor in the sense in which that expression is used in reference to those who effect improvements to land possessed by them. He knows that the land leased belongs to another; nor has he *possessio civilis*.* As against a prior mortgagee he cannot, according to better opinion, claim for improvements even where there is a stipulation in his favour in respect thereof in the lease [V. L., Kot. Tr., Vol. II., p. 112, n.].

Is a lessee entitled to compensation for improvements?

Rights of possessor as against mortgagee.

It may here be mentioned that a *bonâ fide* possessor is entitled to compensation for improvements, even as against a mortgagee, to the extent to which he has enhanced the value of the thing mortgaged [*Ibid.*].

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* See Part III., B. I., Ch. 5 *infra*.

Rights of possessor in respect of improvements.

As to the rights of a possessor of immovable property in respect of improvmeents effected by him, the law as explained by Voet is substantially as follows—The right in respect of improvements of a person [possessor] against whom an action is brought to recover a whole inheritance differs somewhat from those of a defendant in a vindicatory action. As regards the former, whether he be *boná fide* or *malâ fide* possessor, he is allowed an action for the recovery of such expenditure as he may be entitled to [Voet 5. 3. 23]. A *bonâ fide* possessor in that case is entitled to expenditure which was necessary, useful, or for mere pleasure. A *malâ fide* possessor to necessary expenditure only. He is entiled to useful expenditure only as far as its results still exist and have improved the estate property ; but he can maintain no claim whatever for expenditure in respect of improvements for purposes of pleasure only. He may, however, remove what he has put up as far as that can be done without injury to the estate property [Voet 5. 3. 21].

In the case of an action *rei vindicatio* the *bonâ fide* possessor is allowed both useful and necessary expenditure, which he may recover by means of retention of the property [Voet 6. 1. 36]. As to things put up for pleasure, he may remove these. Sometimes even useful improvements he may be required to remove at the discretion of the judge. A *malâ fide* possessor deducts necessary expenditure only. Other improvements he is at liberty to remove, but in respect thereof he is not entitled to claim compensation [Voet 5. 3. 21].

Most of the observations hereinafter made are intended to apply to the case of a possessor from whom the thing possessed is sought to be recovered by the ordinary vindicatory action. Improvements are of three kinds—Necessary, Useful, and Ornamental. A *malâ fide* or *bonâ fide* possessor may, as far as this can be done without injury to the property, remove anything put up for mere pleasure [ornamental

Different kinds of improvements.

Rights of possessor.

improvements] if what he removes would after its removal be of use to him, unless the owner were prepared to pay as much as the things when removed would be worth to the possessor. A *malâ fide* or *bonâ fide* possessor may also deduct *necessary* expenditure to the full amount, except in the case of a thief who has spent money on movable property stolen by him. But as to useful expenditure, a *bonâ fide* possessor may recover to the full amount, as far as the value of the property has been actually enhanced thereby, although the amount expended may have been greater than the value of the improvement as it now stands, as often happens in the case of buildings, unless the expense was immoderate and not such as what the owner would himself have incurred [*nec eas ipse dominus fuisset facturus*], in which case he either removes the improvements as far as he is able, or only recovers from the owner as much as the materials would be worth after removal. If, however, the useful expenditure incurred be less than the value, at the moment, of the advantage derived therefrom, no more can be recovered than the actual amount expended, as more frequently happens in the case of plantations of trees whose increase in size and value owing to the nourishment they have received should, it is reasonable, go to the credit of the owner of the soil rather than to that of the planter. But a *malâ fide* possessor, as a rule, has only the right of removing useful improvements, as far as this can be done without damage to the property as it originally stood, if it is not shown that he incurred the expense as a gift [Voet 6. 1. 36].

Rights of a builder on another's ground.

But whether, if a person knowingly builds on another's ground with his own material, he can claim such material whenever again separated, which he would not, without detriment to the house, have been able to remove while it formed part of the building, is a question not free from doubt. The better opinion

seems to be that such separated material can be vindicated if the *malâ fide* possessor built on the owner's land with his knowledge and sufferance. But if the owner were not aware of what was being done, recovery of the expenditure will not be allowed [Voet 6. 1. 36].

As to the case of a person who at the outset acquires land belonging to another *bonâ fide* and by a lawful title and afterwards builds upon it, but at a time when he has come to know that the land belonged to some one else, Voet cites the opinion of Ulpian to the effect that such a person is not to be classed in all respects as a *malâ fide* possessor, but that he should be allowed to remove what he has erected without cost to the owner of the soil [Voet 6. 1. 36].

Rights of *malâ fide* possessors.

Finally, Voet broadly lays down that since it is repugnant to the principles of natural reason that any one should be enriched at another's expense, it is customary to allow even *malâ fide* possessors to have the right of recovering useful expenditure, nor is their possession to this extent distinguishable from that of *bonâ fide* possessors who have incurred expense usefully [Voet 6. 1. 36].

Deduction of produce already enjoyed.

The fruits and produce derived from the property must first be set off against the expenses incurred, not upon such fruits and produce alone, but upon the property itself; and if anything is found to have been expended in excess of the quantity of produce derived, that alone can be deducted [Voet 6. 1. 38].

But whether the fruit derived by the *bonâ fide* possessor from the improvements made by him must also be set off against the expenditure incurred by him, is not sufficiently clear. The better opinion seems to be that such fruit is not to be so set off [Voet 6. 1. 39].

A part owner of a house might without the other's consent cause it to be repaired, but a co-owner was not allowed to alter the form of the building, except with the consent of all [V. d. K. 777]. One co-owner cannot

build a house on a land held in common without the consent of the other co-owners [*Silva v. Silva*, 6 N. L. R. 225].

Summary by Burge.

The summary of the law as regards compensation for improvements given by Burge is as follows [3 B. 32]—The possessor is entitled to deduct the expenses which have been incurred by him on the property possessed, and which he may be compelled to restore. These expenses are either such as were necessary, *impensæ necessariæ*, so that if they had not been incurred the property would have been lost, or such as have improved and rendered the property more valuable, *impensæ utiles*, or have contributed to the ornament, but have not increased the profits, of the property, *impensæ voluptuariæ*. Necessary expenses may be deducted by a *malâ fide* as well as by a *bonâ fide* possessor.

Expenses are necessary, useful, or for purposes of pleasure.

To what extent a *bonâ fide* possessor is to be reimbursed for useful expenditure.

The full amount of that expenditure which contributes to and increases the actual value of the property, *utiles impensæ*, may be deducted or retained by a *bonâ fide* possessor, if it does not exceed the value of the property, or is not so considerable that the owner would be compelled to dispose of the property itself in order to repay it. In this case the possessor may remove such improvements as are capable of being removed. He can recover only so much of the amount of the expenditure for which he has not by such removal indemnified himself as may, considering all the circumstances, be reasonable. The amount of expenditure to which be is entitled is merely that which was actually incurred, and is not to be increased by the increased value to which it has raised the property.

Right of *malâ fide* possessor.

A *malâ fide* possessor is not, however, entitled to make any deduction in respect of such expenditure, but as the law will not allow one person to enrich himself at the expense of another, he is permitted to take away such improvements as can be removed

without detriment to the property. It is considered that if even a *malâ fide* possessor had incurred this expenditure with the knowledge and acquiescence of the owner, he has a right to recover it, for it was a fraud in the owner to permit it to be incurred without intending to repay it.

Removal of ornamental improvements.

Expenditure which is called *voluptuariæ*, and does not contribute to the real improvement of the property, cannot be recovered either by a *bonâ fide* or *malâ fide* possessor. The additions which may be classed under this description of expenditure must be removed when that removal can be made without injuring the property. The rents and profits which have been received are to be set off against the expenses incurred in producing those profits, as well as in the improvement of the property itself. If there has been anything expended beyond the amount of such rents, it is either to be removed or deducted according to the rules laid down. For, although a *bonâ fide* possessor may have acquired an absolute right in the fruits which have been actually consumed by him, yet there is no reason for not setting them off against his claim for the expenditure.

How compensation of possessor is to be calculated.

It has been insisted by some jurists that the fruits received by a *bonâ fide* possessor in consequence of his improvements ought to be set off against the expense incurred by him in making those improvements. This doctrine is opposed, and would seem not to be sanctioned. It tends to deprive the *bonâ fide* possessor of the protection which the law intended to give him, and as the amount of the expenditure which he is enabled to recover is restricted to its value at the time he restores the property, there would be great injustice in subjecting him to the whole risk of that expenditure, since it might happen that at the time of the restitution the value of the improvements had from various causes diminished.

The law cited above as to the rights of a person in possession of immovable property belonging to another in respect of improvements effected by the possessor is manifestly somewhat diffuse and confusing. Locally, the subject has not received methodical treatment, and the decisions on the questions involved summarised below do not, it will be seen, help to carry the subject far in the direction of consistency and coherence. After giving the substance of these decisions, we shall proceed to give succinctly the rules deducible from the more reliable and more rational of the authorities, which we hope will serve as a key to the practical solution of some at least of the moot points that usually arise in connection with this subject.

In *Appuhamy v. Silva* [1 S. C. R. 71] it was held that the right to retain possession of land until compensation is paid for improvements effected to it was a right known to our law, and that this right might be asserted by the party who has effected the improvements, not only as against the owner under whom he got into the land as a tenant, but as against those claiming title to the land on conveyances from such owner. Summary of decisions.

A *bonâ fide* possessor is entitled to the *impensæ necessariæ*, *impensæ in fructuum perceptionem factæ*, and the *impensæ utiles* also in so far as these have enhanced the value of the property and beyond what the possessor has been reimbursed by the profits [Gren. 73, Part III., p. 43].

One who has planted and improved land while in *malâ fide* occupation of it is not entited to claim compensation from the owner [*Endorissa v. Andorisa*, 6 N. L. R. 350; 3 B. 192].

A tenant can retain leasehold premises against all the world until compensated for the benefit to the owner of the soil from improvements made by the tenant [*Appuhamy v. Silva*, 1 S. C. R. 243].

A monthly tenant or a tenant at will has no claim against the landlord, in the absence of any express stipulation as to repairs and improvements, for payment for repairs made by him [*The Dimbula Valley Tea Co. v. Antho Appu*, 1 Br. 343].

The right of a tenant under the Roman-Dutch Law to retain possession of premises occupied by him until compensated by the landlord for improvements is at most an inchoate right in the tenant himself, and such right is neither assignable nor capable of being seized and sold under writ against the tenant, so as to pass the right of retention to the purchaser. The mere building of houses on the land of another and paying ground rent therefor raise no presumption of any right in the tenant to compensation [*Rumbold v. Andiyappa*, 8 S. C. C. 61].

The builder of a house on another man's land does not acquire a saleable right to the house, but the house becomes the property of the owner of the soil. Between the owner and the builder there may exist equities, such as a right to compensation, &c., but the ownership of a building cannot ordinarily be in one man, and that of the soil on which it stands be in another man [*De Silva v. Harmanis*, 3 N. L. R. 160].

The planter's share in a plantation, or the planter's interest, if any, in land planted by him, is the creature of the contract made between the owner of the land and the person who undertook the planting. It does not arise immediately from the fact of planting by force of a customary law, although, if a contract is established, any custom in view of which it was made may serve to supplement it, and supply its defects. In the absence of evidence of an express grant, user assented to, or not disturbed by the owner, will be evidence both of the existence and of the extent of the right [*Silva v. Haminey*, 2 S. C. C. 4].

One of two co-owners of a parcel of land who plants half of it is bound to give the other, as part owner of the land, his share of the proceeds of the cultivation [*Chellappa v. Ponnampalam*, 3 N. L. R. 118].

A co-heir who has paid off in full the amount of a mortgage granted by his deceased parent has the right to recover from the co-heirs their respective shares of that amount as *utilis impensa*, but he cannot exclude his co-heirs from possessing the land till their quota is paid [*Ukku v. Bodia*, 6 N. L. R. 45].

Money spent in the cultivation and upkeep of a coffee estate enjoys no tacit hypothec upon the property with preference over a prior special conventional mortgage [Gren. 73, Part III., p. 102].

Where a possessor who has made improvements on a land believing it to be his own sells it with the improvements thereon to another, he must be taken to have sold with the land the right to such improvements, and with them the right to defend possession of them by every available means, among which is the *jus retentionis* till the *impensæ utiles* are refunded. The *jus retinendi* passes in the sale from one *bonâ fide* possessor to the other without a special custom. The money which a *bonâ fide* possessor pays in discharge of a mortgage which encumbered the property when it came into his hands is *utilis impensa*. The rules as to the extent to which the *impensæ utiles* can be recovered from the owner are (1) when the outlay has exceeded the permanent advantage to the property, the owner is only liable to the extent to which the property has really been rendered more valuable by it. (2) And not even to that amount, if the outlay has been very much greater than the owner would himself have made; in which case, it is left for the Judge to determine on a consideration of all the circumstances and persons how much should be recovered. (3) If at the time of the suit the improved value of the property

caused by the expenditure exceeds the amount so laid out, still only the sum actually expended can be recovered from the owner. (4) When a claim is made for compensation, an account has to be taken of the mesne profits received, and only so much of the expenditure, whether made on the production of the fruits or on the property itself, as exceeds the amount of these profits or *fructus* can be allowed, subject, however, to the preceding rules. (5) And in taking this account fruits which have been consumed as well as those which are still extant must be set off against the claim for expenditure. The fruits of the expenditure itself, however—*fructus ex ipsa melioratione percepti*—are to be excluded from the accounting and not to be set off against the claim [*De Silva v. Shaik Ali*, 1 N. L. R. 228].

The right to compensation arises when one who is in possession of the property of another expends money on that property either on necessary maintenance or improvements which permanently increase the value of the property. The cost of erecting a factory on a tea estate and of clearing the tea which had been overgrown by jungle should be compensated, but the person in possession has no right to put on one side of the account the amount spent by him in growing and manufacturing tea, and on the other side his receipts, and deducting the latter from the former claim the balance as necessary expenditure [*Muttiah v. C. Clements*, 4 N. L. R. 158].

Lastly, as held by Berwick, A.J., in *Banda v. Banda* [3 S. C. C. 31], and as already observed in these pages, under the Roman-Dutch Law a person entitled to compensation for improvements may recover it not only by retention of the land until he has recouped himself for this from the rents and profits, but also by a *personal* action. And if the possession has been parted with or lawfully lost, his only means of recovering compensation for improvements is by action.

The above are the principal among the decisions on the subject of the rights of a person in possession of land in respect of improvements made by him. As observed already, they do not go far to elucidate the subject. It is primarily necessary to distinguish the position and rights of a *bonâ fide* possessor from those of a *malâ fide* possessor. In Roman Law, says Mr. Morice, at one time a Judge of the High Court of the South African Republic, a distinction was made between *bonâ fide* and *malâ fide* possession. The *bonâ fide* possessor of immovable property was the person who occupied it believing that he was the owner; the *malâ fide* possessor was without such belief. The *bonâ fide* possessor who built upon or planted land, although the building or plants would by accession belong to the owner of the land, was entitled to compensation for the increased value of the land against the true owner. The *malâ fide* possessor had no such right. In Dutch Law even the *malâ fide* possessor was entitled to some compensation, although he had not the right of retention of the *bonâ fide* possessor. The subject is discussed at length in the South African cases—*Bellingham v. Bloommetje* [Buch. 1874, p. 36]; *Barnard v. Colonial Government* [5 S. C. 122]; *De Beers Con. Mines v. L. and S. A. Exploration Co.* [10 S. C. 359, 12 S. C. 107]—[See Morice, Eng. and R.-D. Law, p. 67].

Meaning of *bonâ fide* possessor and *malâ fide* possessor.

Their rights in respect of improvements.

The following rules deducible from the more reliable of the authorities cited will, it is hoped, be found sufficient to enable the reader to solve the more important of the questions involved—

Rules regarding rights to compensation for improvements.

(1) Improvements are divisible into three groups or classes—*Necessary*, *Useful*, and *Ornamental*.

Improvements classified and defined.

(2) *Necessary* improvements are such as were essential to preserve the property improved in the state in which the possessor found it, or, if he found it in an impaired state, to restore it to such condition as would render it available for the purposes for which it was originally

Necessary improvements.

intended by the owner, provided that, in this latter case, all intention of such restoration had not been abandoned by the owner himself. If such intention had been abandoned, restoration by the possessor would more properly partake of the characteristics of *useful* than of *necessary* improvement.

Useful improvements.

(3) *Useful* improvements are such as ordinarily serve, or are intended to serve, some useful purpose.

Ornamental improvements.

(4) The word *Ornamental* is somewhat misleading. It is used in the sense of serving purposes of pleasure, occasions of festivity, &c., *voluptuariæ* being the Latin word used [see Voet 5. 3. 21]. *Ornamental* improvement, such as the planting of trees in suitable localities near a dwelling-house or in a park, would really be a useful improvement, and fall within the second rather than the third category.

Right of owner to claim improvements.

(5) In the case of all *necessary* and *useful* improvements, and in the case of *ornamental* improvements so attached to the property improved as to render it impossible to remove them without substantial injury to such property, the owner of such property has a right to claim that they be left intact, the possessor, whether *bonâ fide* or *malâ fide* being, in the event of the owner exercising such right, entitled to adequate compensation.

But, how far is the owner *bound* to accept the improvements and pay compensation ?

(5*a*) It may here be mentioned that where the owner is not *bound* to accept the improvements, but he is entitled to do so at his option, he may either accept them and pay compensation ; or he must allow the possessor to remove them, provided the removal can be effected without permanent or substantial injury to the property improved. In the case of possible substantial injury, the court may consider the question of allowing the possessor to remove the improvements on suitable terms and conditions, and on his giving

adequate security to restore the property to its original state after removal, and thus afford, *where possible*, suitable relief.

Owner bound to accept necessary improvements.

(6) The owner of the property improved is bound to accept the improvements and pay compensation where the improvements are *necessary* improvements effected by a *bonâ fide* possessor, or if effected by a *malâ fide* prosessor, they have been effected *bonâ fide*, that is to say, with no intention of merely recovering compensation from the owner or serving some such ulterior object.

When owner is bound to accept useful improvements.

(7) The owner of the property is bound to accept the improvements and pay compensation where the improvements are *useful* improvements effected by a *bonâ fide* possessor, unless the cost of the improvements has exceeded the value of the property or was immoderate. In this case the owner of the property improved is not bound to accept the improvements, but the possessor may, subject to the limitations laid down in rule 5*a*, remove as much of the improvements as is capable of removal, recovering for the rest as much as would be found to be reasonable, considering all the circumstances of the case.

(8) As to *Ornamental* improvements, whether effected by a *bonâ fide* or a *malâ fide* possessor, the owner of the property improved is not bound to accept them.

The questions as to the method of calculating compensation and as to how the rights here defined are to be enforced are left for decision by the help of the authorities cited above.

SECTION III.

Prescription as a Means of acquiring Title.

Acquisition of right of property by prescription.

Right of property was also acquiredby Prescription of time,* that is, by undisturbed possession for the third part of a century [V. d. L. 1. 7. 2]. That was the period in respect of immovable property, unless the owner was prevented by war or invasion from advancing his claim [Grot. 2. 7. 9]. In the case of actions *in personam* a prescription of thirty years was sufficient ; and in these prescriptions of a third of a century and of thirty years neither *bonâ fides* nor a just title was required [V. d. K. 207].

Usucapio under Roman Law.

Originally, under the Roman Law, the only means whereby ownership by possession was acquired was *Usucapio.* The conditions necessary to acquisition *per usucapionem* were (1) a certain length of possession, (2) uninterrupted possession, (3) *bonâ fides*, and (4) *justus titulus* [Hunter's Rom. Law, 119 ; Sand. Just. 47, 218]. *Usucapio*, however, was limited in its application. It operated only in favour of citizens, and of those Latins and others who had the *commercium.* It did not apply to lands out of Italy, nor, with certain exceptions, to servitudes. The Prætors supplied these defects by the theory of possession for a long time, and introduced the pleas or defences of *præscriptio longi temporis* and *præscriptio longissimi temporis.* These, at the commencement, were no more than pleas or defences by which the demand of the plaintiff could be resisted, but Justinian, in whose time all difference between the *solum Italicum* and the *solum provinciale* was done away with, changed the law, and placed prescription very much on the same footing as *usucapio.*

Introduction of prescription by the Prætors.

Change in the Law of Prescription by Justinian.

* See p. 237.

Prescription thereafter conferred *dominium*, and was not merely a means of repelling an action.

Justus titulus and *bonâ fides.*

It further required the old conditions of *bonâ fides* and *justus titulus* [Hunter's Rom. Law, 144; Sand. Just. 219]. By *Justus titulus* or *justa causa*, it may here be mentioned, is meant any act, fact, or event recognised by law as a method of transferring the legal ownership of a thing; and *bonâ fides* is used to signify that the possessor had commenced his possession in the belief that he was entering upon the property as true owner and quite ignorant of any defect in his title, the ignorance here referred to being ignorance of facts.

Prescription, a mode of acquiring title under the Roman-Dutch Law.

Under the Dutch Law prescription was one of the modes of acquiring ownership. A title to property was acquired by undisturbed possession for a third of a century. This was generally taken as applying to both movable and immovable property, although Grœnewegen [De Leg. Abr., p. 677] thought that thirty years was sufficient for movable property. In the case of immovable property, if the possession was unaccompanied by registration, it would probably give the right to demand registration. The *justus titulus* or good origin of the possession that was required under the Roman Law was not necessary under the Dutch Law. Prescription did not run against minors or other persons under disability, nor against persons who had been abroad for necessary and proper reasons [Morice, Eng. and R.-D. Law, p. 33].

Is *justus titulus* essential under Roman-Dutch Law?

On the question whether *justus titulus* is necessary for prescription under the Roman-Dutch Law, Burge says—"It is not essential to prescription that there should have been *bonâ fides* or *justus titulus*. It is sufficient that the party has for the required space of time held peaceable and continued possession without any interruption by the true owner, without any acknowledgment by him in possession of that person being the owner, and without any suit having been

instituted against him;" and Voet [44. 3. 9] supports this view. Grotius, on the other hand, says that the possessor was required to have a lawful title and should have commenced his possession *boná fide* [Grot. 2. 7. 2]. It is, however, possible that Grotius is not speaking here of prescription as developed by later legislation. See sections 9, 5 *et seq.*

Difference between English and Roman-Dutch Law as to prescription.

According to the English Law there is no acquisitive prescription; that is, ownership is not acquired by prescription except in the case of incorporeal rights such as easements. Prescription, or, as it is called in English Law, limitation works negatively by depriving of his remedy the person with an adverse claim. The Real Property Limitation Act, 1874 [37 & 38 Vict. ch. 57], however, goes further than this by extinguishing the right of a person who fails to bring his action within the prescribed period of twelve years. Minors and persons under disability are allowed at least six years from the expiration of the disability.

What things could not be prescribed for.

Movable property acquired by robbery or theft [unless it had first again passed through the hands of the real owner] and matters in course of litigation could not be prescribed, nor could consecrated things, graves, or property belonging to the State or to towns, that is, property possessed by or already given over to the State or towns [Grot. 2. 7. 2].

Possessor must have a lawful title.

The possessor, says Grotius as observed already, was required to have a lawful title. Ignorance of law on his part was no excuse, though ignorance of fact was, *e.g.*, if he thought that the person from whom he had received the property was the real owner thereof. An heir had the benefit of the *boná fides* of his ancestor, even though he himself had become better informed; but *malâ fides* of the ancestor prejudiced him, though he himself was in ignorance.

Period of occupation by purchaser and seller reckoned together.

The periods of occupation of a purchaser and seller were reckoned together, provided both possessed *boná fide* [Grot. 2. 7. 2].

Rights of possessor against third parties.

Pending the completion of the period of prescription the possessor had no right as against the owner, but as against third parties he had as much right as if he had already acquired the ownership by prescription, [Grot. 2. 7. 2].

Prescriptive possession in Ceylon.

In Ceylon, proof of the undisturbed and uninterrupted possession by a defendant in any action or by those under whom he claims of lands or immovable property by a title adverse to or independent of that of the claimant or plaintiff in such action, that is to say a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred, for ten years previous to the bringing of such action, entitles the defendant to a decree in his favour with costs. In like manner, when any plaintiff has brought an action, or any third party has intervened in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as aforesaid by such plaintiff or intervenient or by those under whom he claims entitles such plaintiff or intervenient to a decree in his favour with costs. The period of ten years begins to run against parties claiming estates in remainder or reversion only from the time when the parties so claiming acquired a right of possession to the property in dispute [Ord. No. 22 of 1871. sect. 3]. The expression "immovable property" here includes all shares and interest in such property, and all rights, easements, and servitudes thereunto belonging or appertaining [sect. 2]. This Ordinance is not retrospective in its effect [*Illangakon v. Perera*, Ram. Rep. 1872–1876, 219].

Ordinance not retrospective.

Disability of owner.

If at the time when the right of any person to sue for the recovery of any immovable property first accrued, such person was under any of the following disabilities, namely, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas, then and so long as such disability continued the possession of such immovable property by any other person is not to be taken as having given such person any right or title to the same as against the person subject to such disability or those claiming under him; but the period of ten years aforesaid will commence to be reckoned from the death of such last-named person or from the termination of such disability, whichever first happens, but no further time will be allowed in respect of the disabilities of any other person. The adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same or by those under whom he claims, however, will be taken as conclusive proof of title in manner provided by the third section of the Ordinance, notwithstanding the disability of any adverse claimant [sect. 14].

Rights of the Crown.

The Ordinance does not in any way affect the rights of the Crown [sect. 16].

Roman-Dutch Law of Prescription swept away.

The effect of this Ordinance and the repealed Ordinance No. 8 of 1834 is to sweep away all the Roman Dutch Law relating to the acquisition of immovable property by prescription, except as regards the property of the Crown [*Terunnanse v. Menike*, 1 N. L. R. 200; Vand. D. C. 262; Wendt 188].

Prescription as against Crown.

Possession of land for a third of a century gives a title by prescription against the Crown [D. C., Colombo, 1,215, Vand. D. C. 83], and possession, as defined above, of Crown land for fifteen years prior to sale thereof by the Crown to a private individual cannot avail as a plea in law to a claim to such land by the purchaser [*Casipillai v. Ramanater*, 2 N. L. R. 33].

Servitudes.

Prescription can now be pleaded in respect of servitudes as it can in respect of immovable

property generally [*Neate v. Abrew*, Wendt, 88; 5 S. C. C. 126].

Adverse possession.

As to "adverse possession," the words in section 3 of the Ordinance, "a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred," contain a definition, and not merely an illustration, of what is referred to in the section as "possession by a title adverse to or independent of that of the claimant" [Vand. 44; *Daniel v. Markar*, Ram. 43–55, 9. *Carim v. Dholl*, 2 C. L. R. 18]. In the case of *Kiri Hami v. Dingiri* [6 N. L. R. 197], Moncreiff, J., having reviewed the older decisions on the subject, held that in order that a person might avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871 (1) possession must be shown from which a right in another person could not be fairly or naturally inferred; (2) possession required by the section must be shown on the part of the party litigating or by "those under whom he claims;" (3) the possession of those under whom the party claimed meant possession by his predecessors in title; and (4) judgment must be for a person who was a party to the action, and not for one who set up the possession of another person who was neither his predecessor in title nor a party to the action.

Possession may be through agent.

The possession referred to in the Ordinance may be through the instrumentality of an agent or a lessee, but possession of a land for the prescriptive period by a lessee under a lessor who at the time of the lease had not title to the land does not enure to the benefit of the lessor so as to create a prescriptive title in him [*Punchi Rala v. Andris*, 3 S. C. R. 149]. Possession, moreover, must be continuous, peaceful, and for a certain period. It is "interrupted" if the continuity

Possession must be continuous, &c.

of possession be broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it, or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation. Possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user [*per* Withers, J., in *Siman v. Christian*, 1 N. L. R. 288]. If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by law suits or by claims in execution or by violence. If he has succeeded in holding possession, such attempts to oust him may make it the more certain that he held adversely to those who disputed with him [*per* Lawrie, A.C.J., in *Siman v. Christian*, 1 N. L. R. 288]. Where the obstruction is by the act of God, as for instance where a pathway is obstructed by floods, there is no such interruption of the user as is sufficient to disentitle the party claiming the right of way to the benefits of the Prescription Ordinance [*Perera v. Gunetilleke*, 4 N. L. R. 181]. A person who abstained from possession because he feared a beating cannot be said to have been ousted [*Dabere v. Marthelis*, 5 N. L. R. 210].

Mere disturbance of possession.

Obstruction by act of God.

Abstention from possession from fear of violence.

Right of way.

The relation of dominant tenement and servient tenement must exist in order to give rise to a right of way by reason of prescripitive user. So, where the plaintiff as tenant of a house used a path over the defendant's land to go to a washing pond, and the plaintiff purchased the house and continued the use of the path, it was held that the plaintiff's user of the path prior to his purchase of the house was not as owner of a dominant tenement, and such user was not to be

counted in the calculation of the prescriptive period [*Fernando v. Fernando*, 4 N. L. R. 189].

Planter's share.

Prescripition with reference to a "planter's share" begins to run not from the date when the planting commenced, but from the completion of the agreement, when the planter has taken his share and begun to possess it adversely to the owner of the land [*Jayasuria v. Omer Lebbe*, 2 C. L. R. 6]. Mere possession does not change the limited right of a planter to the absolute right of an owner, unless by some act of his the planter put himself at arm's length from the owner, challenging his right and asserting a right in himself, for instance, by refusing to pay money or deliver a part of the produce, clearly showing that he claimed to hold thenceforth on a title adverse, instead of as heretofore on a title, if not subordinate, at least coordinate and certainly not independent [*Cumberland v. Fernando*, 2 Br. 129].

Possession by licensee.

A person let into possession as a tenant or licensee is deemed to occupy on the footing on which he was admitted until by some overt act he shows an intention to occupy in another capacity [D. C., Ratnapura, 727. S. C. Civ. Min. 10th Aug. 1898.] It was further held in this case that a mere occupation by a licensee is insufficient to enable him to found a title by prescription. There are cases in which the Supreme Court, or at least a majority of its judges, have held that a person who has been in possession of land belonging to another for ten years previous to the institution of an action in terms of section 3 of Ordinance No. 22 of 1871 acquires title by prescription, even though his possession originally commenced with the permission of the owner [*Anthonisz v. Cannon*, 3 C. L. R. 65, 3 S. C. R. 63; *Carrim v. Dholl*, 2 C. L. R. 118, 1 S. C. R. 282]. And in the case of *Sinno Appu v. Silla Umma* [Ram. Rep. 1872–1876, 318] it was held that although by the Roman-Dutch Law possession *precario*, however long,

Possession commencing with permission of owner.

Possession *precario*.

gave no prescriptive right, yet on the local Ordinance which wholly governed the matter such possession would be sufficient for purposes of prescription, if there was no acknowledgment of title within the meaning of the Ordinance. It was further held in this case that the circumstance of the defendant having asked for time to quit did not amount to an acknowledgment of title within the meaning of the Ordinance. It is difficult to trace the source of the words—"a possession unaccompanied by payment of rent, &c.," in section 3 of the Ordinance. This part of the section has been so clumsily framed that there is justification for the ruling referred to above, but we venture to suggest that it was the intention of the Legislature to introduce the wholesome requirement of *justus titulus* or *justa causa* of the Roman Law and most of the legal systems that have flowed from it. The Ordinance speaks of undisturbed and uninterrupted possession *by a "title"* adverse to, &c., and it would appear that the words "a possession unaccompained by payment of rent," &c., were intended to be explanatory of the expression "possession" only, used in the earlier part of the section, and of the nature of the possession there referred to, the result being that the possession referred to in the earlier part of the section should be a possession unaccompanied by the payment of rent, &c., and also a possession on the footing of a title derived from a source adverse to and independent of that of the claimant. It would, it is suggested, be well that, saving the rights of all parties to compensation for improvements, &c., such a requirement as the above regarding title should be insisted upon, especially in the circumstancs of this country, where facts as to length of possession and date of its commencement are obscured by testimony which, to say the least, is in no small percentage of cases tainted with the infirmity of conscious or unconscious exaggeration.

Possession commencing with permission of owner.

In the recent case of *Nagudu Markar v. Mohammadu* [7 N. L. R. 91] the judgment in *Anthonisz v. Cannon* [3 C. L. R. 65] referred to above was practically overruled, and it was held that where a person, in consideration of certain services and outlays of money, was permitted by the owners of a house to enjoy its rents and recoup himself, he was not entitled to the benefit of section 3 of Ordinance No. 22 of 1871, in the absence of evidence to show that he had got rid of his character of agent. This case was followed in the judgment in *Joseph v. Annapillai* [3,092, D. C., Jaffna, S. C. Civ. Min., 28th March, 1904], in which all the older cases will be found collated and commented upon.

Possessor cannot by his own act change rights by which he assumed possesston.

In this connection it may be stated that the maxim of the civil law, *Neminem sibi ipsum causam possessionis mutare posse* — that is, that a person having possession of property by one right or title cannot by his own act and without the intervention of some new title change the character or title by which he previously held it—has not been departed from in Dntch jurisprudence.

Possession must be of one's own right.

The possession necessary to create title by prescription must be a possession as of one's own right. There are two points, said Sargeant Rough, C. J., in an old case [see Ram. 1860–1862, 145], regarding the law of prescription that should be always well borne in mind ; the first, that a possessor is always presumed to hold in his own right and as proprietor until the contrary is demonstrated ; the second, that the contrary being once established, and it being shown that the possession commenced by virtue of some other title, such as that of tenant or planter, the possessor is presumed to have continued to hold on the same terms until he distinctly proves that his title has been changed.

It is on the principle that the possession must be as of one's own right that it has been thought that the

Municipal Council cannot in itself and by its personal action prescribe for any particular street [*Municipal Council of Kandy v. Philip*, 1 S. C. R. 50].

Possession must be of party to suit.

The possession contemplated by the Ordinance is that of a party to a suit and of his predecessors in title, but not that of a third party. Thus, it is not competent for an execution-creditor, who in an action under section 247 of the Civil Procedure Code is seeking to have it declared that certain immovable property which has been released by order of court from seizure under a writ in execution of a judgment held by him is available for levy as his judgment-debtor's property, to lay a foundation of title in his debtor by proving prescriptive possession of the property by him [*Terunnanse v. Mendis*, 1 N. L. R. 200], but where a plaintiff, as execution-creditor, purchased his execution-debtor's interest in a land, he can prove his debtor's prescriptive possession of the land and rely on it in support of his own title [*Masilimany v. Sinnaven*, 1 Br. 324].

Possession must be *ut dominus*.

The possession, moreover, must be possession *ut dominus*. It must be possession either in person or by agent with the intention of holding the land as owner [*Maduwanwelle v. Eknelligoda*, 3 N. L. R. 213], and it must be exclusive. Where certain members of a community of oilmongers sought to establish on behalf of their community a claim by prescription to a piece of land for the purpose of burial and cremation, and led evidence to show that the piece of land had been principally used by certain families of oilmongers as a burial and cremation ground, it was held that this was not sufficient to entitle the plaintiffs as representing the community to a decree of title to the land for the purpose of future interments [*Adakkan Chetty v. De Silva*, 6 S. C. C. 21].

Should possession immediately precede action?

The possession, it was held in *Casie Chitty v. Perera* [8 S. C. C. 31 : 1 Br. 401], should be for ten years immediately preceding the bringing of the action, but

that was held not to be necessary in the later case of *Banda v. Banda* [4 N. L. R. 302].

Can party ousted maintain an action on the strength of prescriptive possession ?

The question has been mooted whether the party claiming title by prescriptive possession should not be in possession at the institution of the action ; in other words, whether a person who has suffered ouster from a parcel of land can maintain an action relying on prescriptive possession prior to ouster. This question was answered in the negative by Bonser, C.J., in *Silva v. Simon* [4 N. L. R. 144 ; 1 Tamb. 24], and in a later case he repeated this opinion ; but in the cases of *Banda v. Banda* [4 N. L. R. 302] and *Appuhamy v. Juanis* [2 Br. 177], each of which was argued before a bench of two Judges, the decision in *Simon v. Silva* was disapproved, and that in *Naker v. Sinnatty* [Ram. 1860, 75] restored, the judges being of opinion that a plaintiff, though not in possession at the date of action, could still claim the benefit of section 3 of the Ordinance.

Owners in common.

As regards owners in common, they may verbally agree among themselves to hold the common property in divided shares, and thereafter each co-heir may prescribe as against the other co-heirs in respect of his own divided portion, and parol evidence may be adduced to support such prescription, although such evidence is inadmissible in support of title under a mere parol partition [*Perera v. Appusingho*, 7 S. C. C. 113. See also *Silva v. Pulle*, 1 Br. 149 and Ram. 1877, 55]. There must, however, be strong evidence of adverse possession to support prescription in such a case [*Ameresekere v. Ram Menika*, 3 N. L. R. 137]. Interruption by one co-owner of a party pleading prescription enures to the benefit of all co-owners [*In re the Claims of Gunasekere, &c.*, 1 S. C. R. 64].

Interruption of prescription by minority.

Where prescription has commenced to run against a party, it will not be interrupted by his death and by the minority of his heirs [Gren. 73, Part II., p. 40], nor

By partition suit.

would the institution of a suit for partition interrupt prescription [3 Lor. 271].

Overhanging tree.

Under the Roman-Dutch Law no right of servitude can be claimed in respect of an overhanging tree [*Muttiah v. Dias*, 2 N. L. R. 83], and even under the English Law the owner of a tree cannot acquire the right to compel his neighbour to let it overhang his land either by prescription or the statute of limitations [*Lemmon v. Webb* (1895), A. C. 1; 64 L. J. Ch. 205].

Public roads.

Nor can prescriptive rights be claimed in respect of public roads.

Plaintiff may prove title only.

In an action *rei vindicatio* the plaintiff may prove, and rely on, his title only; and he would thereupon be entitled to judgment unless prescriptive possession is proved by the defendant [see *Appuralle v. Dawson*, 3 S. C. R. 1].

Evidence of prescriptive possession in anticipation.

But where title by prescription is pleaded by the defendant, it is open to the plaintiff to adduce, in the first instance, evidence of possession by himself in anticipation of the defendant's case [*Kapuruhami v. Hendrick*, 3 N. L. R. 144].

Presumption as to possession.

The presumption of law is that the possession of land is in the legal owner, and the burden of proving a prescriptive possession adverse to that of the legal owner lies on the person who sets up such a claim [*Fernando v. Scharinguivel*, Ram. Rep. 1872–1876, 216].

Interruption of prescription by legal proceedings.

As regards interruption of prescription by legal proceedings, the majority of the Court held in the case of *Emanis v. Sadappu* [2 N. L. R. 261], following the decision in *Unambuwe v. Janohamy* [2 C. L. R. 103], that an action for the recovery of land which had ended in a nonsuit or other decree against the plaintiff was not such an interruption of the defendant's adverse possession of the land as disentitled him to a decree in his favour, in terms of section 2 of Ordinance No. 8 of 1834 or section 3 of Ordinance No. 22 of 1871, in a subsequent action against him for the same land by the same plaintiff.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff "possessed" the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by the Court [*Peynis v. Pedro*, 3 S. C. C. 125]. Lastly, it has been held that evidence of a party's title by prescriptive possession is inadmissible in a case in which such title has not been set up in the pleadings [*Komalee v. Kiri*, 8 S. C. C. 156]. That decision was before the coming into operation of the Civil Procedure Code. It has been held that after the Civil Procedure Code prescription may be pleaded in an action *ore tenus* at the trial, subject to the question of costs [*Arunasalem v. Ramanathan*, 1 C. L. R. 77 ; 9 S. C. C. 190]. In so far as this decision is based on section 46, subsection (*i*), of the Civil Procedure Code, it is presumably not applicable to actions for the declaration of title to, or the recovery of, immovable property.

General statements as to possession not to be admitted as evidence.

Prescriptive possession must be pleaded.

SECTION IV.

Specification.

Specification.

Giving new form to material of another.

SPECIFICATION,* also termed Confusion, is another mode of acquiring right of property. It takes place when a person in good faith gives a new form or character to the material of another. He then becomes the owner of the thing formed out of such material. For instance, if a person brews beer with the corn and malt of another, or makes mead with another man's wine and honey, or even partly with his own and partly with those of another, what is so made becomes the property of the maker, if he were under the impression that all the ingredients belonged to himself ; but if he knew that the material belonged either partly or wholly to another man, the latter retained his right to the material, and the maker lost his labour and material, except in case of those things which even after specification could be easily reduced to their original form or character, such as a cup of gold or a silver basin which could easily be reduced to gold or silver in the mass. In recognition, however, of the regard due to the art of painting, it has been laid down that whoever paints in good faith on the canvas or board of another acquires ownership in the same. By analogy, says Grotius, the same rule ought to apply to a person who writes on another's paper [Grot. 2. 8. 3 ; V. L. 2. 5. 3 *et seq.*].

Compensation by him who acquires property by *specificatio*.

Whoever thus acquires anything by *specificatio* must give reasonable compensation to the owner of the material [Grot. 2. 8. 4].

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* See p. 237.

Confusion—materials of different owners becoming mixed.

Confusion takes place when materials belonging to different owners become inseparably mixed. For instance, when silver belonging to two different owners is melted together by consent of parties or by accident, the united mass becomes common property, each being entitled to a share in proportion to his original share in the material [Grot. 2. 9. 8]. But where the materials are separable, as where the gold of one man is mixed with the copper of another, or one man's wheat with another man's rye, the ownership is not altered, unless the mixture takes place with the consent of the owners [Grot. 2. 9. 9].

CHAPTER II.

INHERITANCE.

Definition.

INHERITANCE* is a sort of real right, or right *in* a thing, by which when a person is entitled to an estate, or to a part of it, or by legacy has acquired a title to anything, he succeeds to all the rights of the ancestor, so that the property acquired by these titles becomes a new species of property [V. d. L. 1. 8. 1].

Inheritance must be entered upon.

This property by inheritance or legacy is not acquired with us or cast upon us solely by descent, or under the will, *ipso jure*, but must be entered upon or accepted by a positive act [*Ibid.*]. The repudiation of an inheritance must be after the inheritance has become vacant by death and before adiation. It may be indicated by any kind of suitable signs. An inheritance which has once been repudiated cannot afterwards be adiated, nor can a person partly repudiate and partly adiate an inheritance [Grot. 2. 21. 3].

Adiation and repudiation of inheritance.

Adiation.

Adiation of an inheritance consists in the intention which may be indicated not only by words but by actions. If the heir disposes of any part of the inheritance, he is considered to have adiated it, unless he declares that he does so merely out of kindness, or unless he has received judicial permission to do so [Grot. 2. 21. 5].

Adiation can not take place of a part only of the inheritance.

The adiation must be effected simply, without any conditions or stipulations as to time, and wholly, and not in part; and once done, it cannot be undone, saving, however, to minors their rights to relief in case they are damnified. The term "wholly" is of such force that even a person who has been instituted heir to a part

* See page 190.

only, if his co-heir cannot or will not be heir, must adiate the share of his co-heir as well as his own, or must repudiate both. Where there are several co-heirs, each of them cannot be sued by the creditors for more than his share, except in the case of indivisible debts. If the testator has forbidden the division among the heirs for a time, but not perpetually, such provision must be observed [Grot. 2. 21. 6].

Heir who has adiated is liable for debts.

Whoever has adiated the inheritance is liable for all the debts, even beyond the assets of the estate, because his property and that of the deceased have become mixed, and because he has stepped into the place of the deceased [Grot. 2. 21. 7].

Action on right of inheritance.

This right of inheritance being, as observed before, a real right, affords a real action. The action is given to every one who is entitled to any inheritance or estate or part thereof against the possessor, whether he hold as heir or simply as possessor, that the party suing may be declared heir, and admitted to the inheritance with all the fruits and profits already enjoyed, or which might have been so.

Actions open to legatee.

As the person entitled to a special legacy obtains by the heir's acceptance of the estate, the right of property in the thing bequeathed, he has, besides the personal action against the heir to deliver it, also a real action for the thing itself [V. d. L. 1. 8. I].

SECTION I.

Testaments and Codicils.

Definition.

A last will is the direction which any one gives as to the disposal of his property after his death. It takes effect only when the proper forms are observed [V. d. L. 1. 9. 1; V. L. 3. 2. 1].

Open will how made.

An open will is made before a notary and two witnesses, or before two members of the court and the Secretary [V. d. L. 1. 9. 1; Grot. 2. 17. 17, 18]. The notary must have been duly admitted as a notary in the place where he makes the act. The witnesses must be males above the age of fourteen years, not incompetent in law, and who take no interest under the will [V. d. L. 1. 9. 1].

The testator must be known to the notary, or, at least to the witnesses [V. d. L. 1. 9. 1], and a notary may not attest a will unless he knows the testator, or at least the witnesses who declare that they know the testator, a memorandum being made of the fact [Grot. 2. 17. 22].

Notaries.

Notaries are persons authorised by the Sovereign, or the heads of Provinces after due inquiry by the court as to their competency. The witnesses must be persons of respectability [Grot. 2. 17. 19, 21].

In Ceylon, Ordinance No. 2 of 1877 [amended by Ordinance No. 3 of 1890 and Ordinance No. 21 of 1900] prescribes the law relating to notaries, and makes provision for their proper qualification and for the more efficient and faithful discharge of their duties, and consolidates the law relative thereto.

A last will or disposition verbally and clearly made before a notary and witnesses must be held good in case the testator, before the minutes or notes should be extended or drawn out, should happen to die, and

thus not be able to sign it [V. d. L. 1. 9. 1]. As a general rule, verbal or nuncupative wills are reduced to writing and entered by the notary in his protocol, from which copies are given by him whenever required and after his death by the court [Grot. 2. 17. 23]. The neglect of the notary in this respect, however, does not render the will invalid [Grot. Tr. Maas. 137, n.]. Nuncupative wills.

A will must bear a proper stamp according to the value of the property or nature of the office held by the testator [V. d. L. 1. 9. 1]. Stamp on will.

A close will is written either by the testator or some person under his direction, provided the person takes no benefit thereby. It must be written on a proper stamp and signed by him, and so given to the notary, who, in the presence of two witnesses, puts it in an envelope and seals it, and makes on the outside the necessary note which is termed the *act of superscription*. A person who makes his will in this way must be cautious to keep the seal and envelope unbroken and unopened, otherwise it loses its force. When such a will is confirmed by the death of the testator, it is opened by the notary, in the presence of witnesses, on the seal and envelope appearing perfect and untouched, and thereof an *act of opening* is made and given out, the original will remaining in the protocol of the notary. Besides these two ways of making wills, a will might, as under the Roman Law, be made verbally in the presence of seven witnesses. This mode had, however, fallen into disuse [V. d. L. 1. 9. 1]. Close wills. Verbal wills.

A will *bonâ fide* executed by a person ignorant of the law before a notary outside the place where he had been admitted to practise was not invalid [V. d. K. 295]. Will attested by notary outside his district.

As to wills of soldiers and sailors in active service see Grot 2. 17. 29. Wills of soldiers, &c.

A testament made *jure militari* was valid even after the lapse of a year from the conclusion of

the expedition, provided the testator had not been discharged from the military service [V. d. K. 299].

Joint wills.

Rights of each spouse in respect of a mutual will.

Two persons, such as husband and wife, for instance, may make their last will in one and the same written instrument [Grot. 2. 17. 25]. Under the Dutch Law mutual wills have been a favourite mode of disposition on the part of married persons. The following propositions in regard to them are laid down by the Privy Council in a leading South African case [*South African Association v. Mostert*, Buch. 1873, p. 31]—(1) That such wills, notwithstanding their forms, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property. (2) That each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and even after the co-testator's death. (3) That the power which a surviving spouse generally has to revoke a mutual will as far as it affects half of the property is taken away on the concurrence of two conditions—(*a*) that the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, that the property is consolidated into one mass for the purpose of joint disposition of it; (*b*) that the survivor has accepted some benfit under the will [Mor. Eng. and R.-D. Law, 272].

Codicils.

A codicil is an instrument less perfect than a will. In form, codicils and wills for the greater part agree. The substantial difference is confined to two points—(1) By a codicil no direct appointment of the heir can be made. (2) A testament can never be made by a private paper, but a codicil may, when the testator has reserved to himself this power by the will, which is termed the *Clausula reservatoria* [V. D. L. 1. 9. 2; V. L. 3. 2. 2]. A codicil cannot contain even the substitution of a direct heir, nor the disinherison of

children, nor can it impose a condition on the heir already instituted [Grot. 2. 25.3]. A fiduciary heir may, however, be instituted in a codicil as a charge upon the instituted heir or the heir *ab intestato*. Codicils serve mostly for the leaving of bequests, and a codicil is not considered annulled by a subsequent testament or codicil, unless such clearly appears to have been the intention [Grot. 2. 26. 9]. There may be more than one codicil, which is not the case with testaments [Grot. 2. 25. 4].

A last will should, as far as possible, be interpreted so as to have effect rather than to be of no avail, and the provisions in a testament, whether ambiguous or clear, must be liberally interpreted according to what is likely to have been intended [Voet 7. 1. 12]. The interpretation must not depart from the proper signification of words, and when a testator has made two contrary dispositions by will, and in each of these seems equally to persevere, or when no distinction can be made in respect to which he perseveres in, and in which he has changed his intention, the one disposition annuls the other, and neither can take effect [V. d. L. 1. 9. 9].

How wills are to be interpreted.

Contrary dispositions in wills.

The word "children" [*kinderen*], where the question relates to the intentions of an ascendant, comprises all descendants; but where it concerns collaterals, refers only to children of the first degree [V. d. K. 304]. This is said to be a decision of the Supreme Court of Holland, and is given by Van der Keessel as a commentary on Grotius's statement, when speaking of the legal right of children to be instituted heirs, that children in that case meant not only those in the first degree, but also those in further degrees in as far as they came in the place of their deceased parent [Grot. 2. 18. 5, 6].

"Children."

The word "enjoy" in wills means such a possession for life as will not interfere with the rights of the

"Enjoy."

remaindermen after the death of the survivor [*Deviot v. Fryver*, 2 S. C. C. 194].

Repugnant clauses.

When there are two repugnant clauses in a will, the latter is to be preferred [Will. on Ex. vol. 2, p. 145]; in a deed, the former.

Blanks.

A phrase such as, "bearing assessment No. ——" must, by reason of the blank, be rejected as insensible [*Assa Umma v. Ahamado Lebbe*, 3 S. C. C. 172].

Who included in expression "children of C."

A clause in a joint will ran as follows—"In the event of us both dying without any issue, all our property shall go the children of C as our lawful heirs;" and it was held that the probable intention of the testator and testatrix was to benefit all the children of C, and not merely those who had been born at the time of the testator's death [*Toondy v. Kalimuttu*, 2 Br. 219. See Voet 28. 5. 13].

Who may make a will.

Prohibited persons.

The right of making a last will is given to all persons, both male and female, except such as are expressly prohibited by law. Prohibited persons are—(1) Those who by reason of any mental or bodily infirmity are deprived of the control and administration of their property, for example, insane persons and prodigals. The latter, however, are allowed to make a last will, provided they have previously obtained an *octroi*, or license, and leave their property to their relations by blood. (2) Those persons who have not yet attained the age of puberty, which for males is fourteen and females twelve years. (3) Those who are born deaf and dumb, and thus cannot make known their will. Those who afterwards become so act most prudently in applying for a license to make their will. (4) Those who, on account of their hatred to any particular religion, make their will to the prejudice of those parts of their family who profess it. (5) Those who have been educated in any charitable institution or hospital which has the privilege of succeeding to the property of the

persons maintained therein [V. d. L. 1. 9. 3; V. L. 3. 3. 2].

Wills of children, orphans, and married women.

A child may make a will without the consent of his parents, and so may an orphan without the consent of his guardian, and a married woman without the consent of her husband. Married persons are accustomed to make a joint will, which is called a *mutual testament*, and which, although contained in one paper, is held as two distinct wills wherein each disposes of his or her separate property. This disposition each is at liberty either mutually or separately to revoke [V. d. L. 1. 9. 3]. An insane person who manifestly has lucid intervals may make a will during such an interval [Grot. 2. 15. 4], and a prodigal too may make his will after the decree declaring him such has ceased to be in force [Grot. 2. 15, 5]. Deaf persons who can speak and dumb persons who can write may make a will. Dumb persons, however, were not allowed to do so by signs, except by permission of the Sovereign, and after due inquiry [Grot. 2. 15. 6].

Mutual testament.

Wills by insane persons and prodigals.

Wills of the deaf and the dumb.

What testator may devise.

Every one can ordain what he wills as to his own property as long as the law does not prevent it. Thus, a testator in bequeathing a usufruct may forbid its being liable for a debt of the usufructuary [Voet 7. 1. 32]; and a testator can dispose of not only his own property, but also of his heirs and even of a stranger. Here, the heir, if he decides to enter on the inheritance, is bound to give up the property or otherwise its value, or secure the property for the legatee [Voet 7. 1. 19].

Effect of repudiating will.

A husband, having survived his wife, made a will disposing of the whole joint estate, and therein gave specific gifts to the plaintiff, the child of the marriage. Plaintiff repudiated the will, and claimed her moiety of the joint estate; and it was held that he was not entitled to any benefit under the will, and could not claim any devise at all under it [*Tambapillai v. Coomaraswamy*, 5 S. C. C. 81].

Survivor of two spouses cannot after enjoying benefits under their will revoke it.

When the first dying of two spouses has bequeathed the survivor any benefit and has afterwards directed how the property of the joint estate is to go after the survivor's death, the survivor cannot after enjoying the benefit dispose of his or her share by last will in a manner contrary to the will of the first dying [Grot. 2. 16. 9].

Right of surviving spouse as regards property dealt with by joint will.

A surviving spouse who has made a joint will with the predeceased spouse as regards their common property and has been appointed heir to the predeceased spouse cannot make a different disposition in respect of that portion of the common property which ought to revert to the substitutes of the predeceased. But as regards that portion which would devolve on his own heirs he may legally make a disposition, except where both the spouses have by common consent made a disposition of the common estate or of the share of the survivor [V. d. K. 283].

Husband cannot dispose of joint estate. Adiation by wife. Joint will.

Right of survivor to alter joint will.

A husband cannot dispose of the joint estate [Vand. D. C. 34]; but where a husband makes a will dealing with the whole estate, and the widow elects to take under it, she cannot thereafter claim her separate half [Vand. D. C. 96. But see *In the Matter of the Will of Wytianaden*, Ram. Rep. 1872–1876, 25]. A joint will, as observed already, is in reality two separate wills, taking effect on the death of each testator as to his interest [*Dias v. Livera*, L. R. 5 App. 137; 49 L. J. P. C. 26]. Where a husband and wife, married in community, made a joint will, and the husband subsequently made a codicil thereto whereby he purported to deal with the whole estate as his own, and then died, it was held that the widow was not bound by either the will or codicil, but was free to deal with half the estate as she pleased, and consequently her creditors were entitled to seize her half of the property in execution of judgments obtained against her [*Geddes v. The Colombo Apothecaries Co.*, 2 Br. 10]. But where

the husband or wife adiates the inheritance under the joint will, he or she cannot revoke it, and it is not revoked by his or her subsequent marriage [*Denyssen v. Mostert*, L. R. 4 P. C. 237; *In re the Estate of Johannes Muppu* and his wife, 2 S. C. C. 14]. If the survivor adiates the will, he or she is in equity at least not entitled to act inconsistently with that will. He cannot make a new will or dispose of the property by gift, but the *dominium* over the share belonging to the survivor continues to be in him, and he can pass title to a *bonâ fide* purchaser [*Mendis v. Mohideen*, 5 N. L. R. 317].

Adiation of will must precede repudiation.

Repudiation of a will must precede adiation, for when once an estate or inheritance has been accepted by the heir, he cannot afterwards repudiate it. Adiation cannot take place after repudiation [Bruyn's Op. of Grot. 197].

Who may take under a will.

All persons, old as well as young, foreigners as well as natives, who are not expressly prohibited by law may take under a will [Grot. 2. 16. 1; V. d. L. 1. 9. 4].

Prohibited devisees.

Of this class of prohibitions are—(1) Bequests to popish priests or religious houses. This prohibition is not extended to popish hospitals or charitable institutions. (2) The device of real property or of that which is considered as savouring of the reality by minors to their guardians, curators, or administrators or their children. (3) Those who have entered into a clandestine marriage or eloped together may not leave anything to each other by will. (4) Children born in incest or adultery can take no more by the will of the parent than their necessary maintenance. With respect to other illegitimate children there is no restriction, except where there are lawful children, in which case they can only take a twelfth part [*Karonchi Hami v. Ango Hami*, 2 N. L. R. 276]. Nor can persons who are guilty of an adulterous union inherit from each other [V. L. 3. 3. 10; *Cens. For.* 1. 3. 4. 35 *et seq.* See "R.-D. Law in South Africa" by

W. L. Bisschop, p. 10]. (5) A man or woman on second marriage cannot enjoy more than the least portion which comes to any one of the children by the former marriage [V. d. L. 1. 9. 4; V. L. 3. 3. 9. *et seq.;* Bruyn's Op. of Grot. 179; Mor. Eng. and R.-D. Law, 259].

How far guardian can take under will of ward.

A guardian cannot take under will of the ward except in the case of his being a parent or collateral relative of the ward who would succeed to him as an heir. In the latter case, however, the relative cannot take more than he would be entitled to as an heir by intestate succession. The children of a guardian and the concubines of wards are also prohibited from taking under the will of the latter. The wife of the guardian is not, provided the institution is not intended merely to evade the law so that the property really devolves on the guardian [V. d. K. 285].

Those who had caused death of testator.

Those who have caused the death of the person to whom they would have succeeded as heirs or legatees cannot take that which has been left to them, but their children are not prohibited from taking [V. d. K. 334].

Persons not yet born as well as those already born, persons mentioned by name or otherwise so described as to be capable of identification, even though there may be some mistake in the name or surname, and partnerships as well as individuals may take under a will [Grot. 2. 16. 2].

As regards godfathers, godmothers, and concubines of minors, Grotius lays down that, as in the case of guardians and administrators of the property of minors, they may not take any immovable property or encumbrances on immovable property under the will of such minors [Grot. 2. 16. 4].

A man who marries or engages himself to a girl under twenty years of age, and a woman who marries or engages herself to a young man under twenty-five, without the consent of the parents or relatives of such person or

of the authorities, may not take anything under the will of the person so married or betrothed [Grot. 2. 16. 5].

Children born *ex prohibitu concubitu* may not take under will of parent.

Illegitimate children born *ex prohibitu concubitu* who, as already observed, cannot take under the will of their parents, may not do so even indirectly [Grot. 2. 17. 6; Dutch Con., Cey. Law Rev., p. 9.] Nor can children, legitimate or otherwise, of the offspring of an incestuous connection take from their grandparents [Voet 28. 2. 14].

List of persons who could not take under wills.

The following list of the classes of persons who, according to the Dutch writers, were under disability as regards taking under wills is given by Mr. Morice in his work on the English and Roman-Dutch Law [p. 259]—(1) Persons who associate with the enemy, exiles, and convicts [V. L. 3. 3. 9]. (2) Children born as the result of adultery or incest cannot take more under the will of their parents than is sufficient for their maintenance. (3) Persons who have contracted an incestuous marriage or committed adultery cannot take under each other's wills. (4) A person who has married a minor without the consent of the parents cannot take under the will of such spouse. (5) The guardian of a minor and the wife and children of such guardian cannot take under the will of the minor during the guardianship; nor can the sponsor or the concubine of a minor take. (6) No person who has caused the death of the testator wilfully or through negligence can take under his will or as a donee *mortis causa;* nor can he who has negligently failed to discover the person who caused the testator's death. (7) No one can take under a will who has since the date of the disposition in his favour lived on terms of mortal enmity with the testator, or has laid a criminal charge against him which placed him in jeopardy, or has had criminal intercourse with his wife or slandered his memory. (8) No one can take who has vexatiously disputed the will, or fraudulently concealed it, or has interfered with the testator's making his will in order to compel him to

make it or prevent him from doing so. (9) A widow who has married within the *annus luctus* [nine months after her husband's death] cannot take under his will. (10) The person who wrote the will by which anything is left to him, even if he did so at the testator's request, cannot take under the will. This applies to a will made by two spouses, one of whom has conferred a benefit on the other [V. L. 3. 2. 5]. This rule, however, has not been followed in Cape Colony in the case of *Van Reenen v. Brink's Trustees* [5 Searle 28]. (11) The notary before whom a will is executed cannot take under it. To these cases must be added that of witnesses who attest a will and their wives or husbands. There were also placaats in Holland against monasteries, congregations not belonging to the Reformed Church, priests, monks, and nuns taking under wills [V. L. 3. 3. 13]; but these placaats are not regarded as being in force in South Africa [Mor. Eng. and R.-D. Law, 260].

Legitimate and Falcidian portions.

Every person is at liberty to dispose of his property by will as he likes, except that children and their descendants must be left by their parents, whether as heirs or legatees, at least their *legitimate portion*. This amounts to one-third, if the children are four or less in number, and to one-half among them, if they are five or more. Parents, if heirs at law, are also entitled to this legitimate portion, but the brothers and sisters of the deceased have not this right, unless an infamous person is appointed heir. In certain cases, however, for very weighty reasons in law, both parents and children may be excluded or cut off from any share in the inheritance; but in such cases the will must be made *in judicio*, or before the Court, or at least in the presence of two commissaries or members of the Court as witnesses [V. d. L. 1. 9. 5; Grot. 2. 18. 6 *et seq.*]. As to causes for disinheriting see Grot. 2. 18. 13.

With the Romans it was also lawful for the heir to deduct his *Falcidian portion*, that is, a fourth part of

the property when more than three-fourths was willed away from him in legacies; but under the Dutch Law this deduction was not permitted, except in the case when the heir entered upon the inheritance under the benefit of inventory [V. d. L. 1. 9. 9. See Grot. 2. 2. 20, 23].

Appointment of heir.

In every will it is necessary that one or more persons should be named as heir or heirs. The words used for this purpose are not important, provided the intention of the testator clearly appears. Nor is the description material, nor the part of the will in which he is named, nor for what time, nor, if there be more heirs than one, whether they are appointed heirs for equal or unequal portions, or with or without condition or reservation. As to conditions, they must have relation to a cause or thing not yet *in esse*. They must also be possible, since impossible conditions are held to be void in law, and as if they had not been inserted in the will. Further, conditions must not be *contra bonos mores*, or of a nature to be irreconcilable with or to overturn or defeat the will of the testator. A condition that the heir should refrain from doing a particular act is lawful, and the heir is bound in this case to give security that he will not do it [V. d. L. 1. 9. 6]. When several persons are all appointed joint heirs, and one or more of these happen to die before the testator, their share goes [by the *jus accrescendi*] to the survivor, unless each of the heirs has only a separate portion of the inheritance [V. d. L. 1. 9. 6].

The heir may be a person known or unknown, born or unborn, provided he be competent to take under a will [Grot. 2. 18. 4].

Where a person is instituted heir from a certain day or up to a certain day, in the former case, the heir entitled *ab intestato* is to keep the inheritance until the appointed day and then hand it over; in the latter, the instituted heir must on the arrival of the day

hand over the inheritance to the heir entitled *ab intestato* [Grot. 2. 18. 21].

In what order friends and relations inherit under a will.

Friends or blood relations or heirs by blood when mentioned in a will are understood as intended to be instituted in the same order of succession in which they would inherit under the common law of the locality, unless there are clear indications of a different intention [Grot. 2. 18. 22].

The institution of a direct, as opposed to a fidei commissary, heir is necessary to the completeness of a testament [Grot. 2. 19. 1].

In an institution such as this—"Let John be my heir, and if he be not my heir, let Peter be my heir"—the words "if he be not my heir" come into operation if he dies before the testator or is by law incompetent to inherit, or repudiate the inheritance [Grot. 2. 19. 5].

Substitution.

As the person named heir may, by dying before the testator or for some other cause, not be heir at the death of the testator, provision is often made by naming one or more others in case of such failure. This is termed *substitution* with the Romans. Besides the common substitution [*substitutio vulgaris*] there were two other kinds—(1) The *Pupillaire* or *Substitutio Pupillaris*, whereby the father appointed the heirs of his child in case he should happen to die under the age of puberty. This was not admitted with the Dutch, although the power whereby parents made a special disposition, that is, whether they should go by the law of one particular province or another as to the succession of their children's property, seemed to resemble it in some degree. (2) The *Quasi Pupillaire* or *Exemplaire Substitutio*, whereby parents might dispose of the property of their children who were not *compos mentis*, provided they died in that state. With the Dutch, to render this act valid, a decree of the court was necessary [V. d. L. 1. 9. 7].

Executors.

In order to render the execution of one's last will more certain, it is the custom to charge one or more persons with this trust, under the name of *executors.* To this office all persons are eligible who may by law undertake the administration of other persons' affairs, even females, though these are otherwise incapable of becoming guardians. These executors are appointed by testament, codicil, or other special act, and they are at liberty to decline the office, wherein they differ from guardians. The office consists in the sealing up of the effects of the deceased at his house ; in providing for his funeral ; in the taking of a proper inventory ; and in liquidating the estate, by collecting in the outstanding debts, and selling the goods; and further, in carrying into effect the last will of the testator as well by paying the legacies as following the other directions of his will; in making out a clear account and statement, and giving over the clear surplus or residue of the estate to the heir, or those who are entitled to take charge of it, who are termed administrators. As a recompense for their trouble they were entitled, under the Roman-Dutch Law, to the fortieth penny on receipts and the eightieth on disbursements, and one per cent. on ready money found in possession of the testator, and on moneys received from rents, annuities, mortgages, and the like redeemed, and with respect to journeys, &c., necessary for bringing the estate to liquidation, to their reasonable charges and expenses [V. d. L. 1. 9. 10].

Power of executor as against heir.

An executor could not under the Roman-Dutch law debar the heirs from the inheritance, unless the testator had directed otherwise. He could not alienate the property of the testator without their consent [V. d. K. 323].

Powers of executors extend to real property.

It has been held that the English law of Executors and Administrators has been introduced into this Island [*Fernando v. Fernando*, 4 N. L. R. 201] ; and, as observed in the first volume of this work [p. 8], the

powers and duties of executors and administrators in Ceylon extends to real as well as personal property [Vand. 273].

Executor under Roman-Dutch Law.

There was no such office as that of administrator under the Roman-Dutch Law; and the Roman-Dutch executor was a very different functionary from the one who bears that name under the English system. He was little more than the agent of the heir. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance, the executorship became a nullity [*Staples v. De Saram*, Ram. 1863–1868, 275].

Whole estate of deceased vests in executor.

In the absence of any special restriction in a will excluding from the executor's power any part of the testator's estate, the executor's power extends to the whole of the estate, though if any part of it is left undisposed of by the will, such part has to be distributed as under an intestacy. So, a purchaser from the executor of property undisposed of by the will acquires good title as against the heirs or persons claiming under them [*Silva v. Perera*, 2 C. L. R. 53].

Administrator may sell immovable property with leave of court.

An administrator with an absolute and unfettered grant of administration can sell immovable property on his own responsibility [*In the Matter of the Estate of Jayewardene*, 1 S. C. R. 83]. But a provision is now inserted in the letters by the authority of the legislature precluding him from selling immovable property without the special leave of the court, and he has no right now to sell without such leave [*Krause v. Pathumma*, 5 N. L. R. 162; 1 Br. 414]. It is the duty of an administrator to collect all the debts due to the intestate's estate; and it makes no difference, for the purpose of collecting debts, that the intestate was married with community of goods, and that his widow surviving him is entitled to half of the deceased's estate after payment of his just debts [*Wikramasekere v. Fernando*, 7 S. C. C. 82]. This case was decided by

Where deceased was married in community of property, whole common estate vests in administrator.

Fleming, A.C.J., and Dias and Lawrie, J.J. The same question as that involved here arose in *Perera v. Silva* [2 C. L. R. 150], and Burnside, C.J., held that upon the death of one of the spouses the entire common estate vests, in the first instance, in the administrator of the deceased, for disposal among the persons legally entitled to individual shares of it; but Lawrie, J., who had taken part in the case of *Wickramasekere v. Fernando*, thought otherwise. He held that an executor or administrator could administer and realise only such estate as the deceased had testing power over, and the administrator of a deceased spouse could not, therefore, deal with the entire common estate, but only with the half to which the heirs or legatees of the deceased had right. In *Dona Maria v. De Silva* [1 N. L. R. 268] Burnside, C.J., again held [Lawrie, J., dissenting] that though by the Roman-Dutch Law the surviving wife acquired a right to one-half of the property held in community during the marriage, yet convenience and the necessity of avoiding multiplicity of suits demanded that the whole estate of the deceased should, in the first instance, vest in the administratrix for disposal among the persons legally entitled to specific shares therein. In *Nonohamy v. Perera* [2 C. L. R. 153] Burnside, C.J., and Withers, J., held that in determining whether administration was necessary regard should be had to the entire estate and not to the deceased's moiety only. It may here be mentioned that the Stamp Ordinance of 1890 provides, as did the repealed Ordinance of 1884, that "where the common estate of a husband and wife shall be administered after the death of one of them, duty shall be paid as for the half estate [Sch. B, Part III.].

Administrator not bound to covenant for title.

An administrator selling his intestate's land is not bound to convenant for title, and when he has conveyed without an express covenant for title, none is implied in law [*Francisco v. Peresenty*, 2 S. C. C. 1].

Executors *de son tort.*

As to executors *de son tort*, it has been held that by the Dutch law persons other than the heirs who meddle with the property of a deceased person are not liable for more than their intromissions [*Nicholas v. Justina*, Ram. 1843–1855, 58]. And in *Prins v. Pieris* [4 N. L. R. 353] Bonser, C.J., said that the English law of executors *de son tort* was in force in Ceylon, and he held that it was the duty of the widow to pay the debts of the community by selling, if necessary, the property of the community, and that a sale by the Fiscal on a writ issued against the widow [who, as executrix *de son tort*, was in possession of the intestate's share of the common property] in execution of a decree on a mortgage bond granted by the intestate gave a good title to the purchaser. No mortgage decree, however, declaring the land specially executable can be made in an action by a mortgagee against a person sued as having by intermeddling made herself an executrix *de son tort* of the deceased mortgagor [*Mytton v. Natchia*, 4 S. C. C. 23]. An alienation of land by a widow to discharge a mortgage thereon is good as against the heirs of the deceased [3 Lor. 235].

No mortgage decree against executor *de son tort.*

Liability of heir who meddles with estate.

An heir who without administration meddles with the estate of a deceased is liable to the extent of the assets received by him as heir [3 Lor. 297].

How executor *de son tort* may discharge himself.

An executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative before proceedings are commenced [*Vernon v. Curtis*, 3 Term Rep. 587; *Hooper v. Summersett*, Wight 16; 12 C. R. C. 64].

Effect of conveyance of property by heirs.

As to the effect of conveyance by the heirs in the absence of administration, it was held in the case of *Pasupathy Chettiar v. Cantar* [8. S. C. C. 205] that although the purchaser of a deceased person's property who takes from any one other than a legal representative, takes a title subject to be avoided by a legal representative administering the estate, yet, when a

bonâ fide alienation has been made by the heirs, and a legal representative appointed a considerable time after seeks to reach the property alienated as assets necessary to be applied in payment of outstanding debts, he must make out a *primâ facie* case showing that it was necessary to resort to the particular piece of property in question; and in *Tikiri Banda v. Ratwatte* [3 C. L. R. 70] it was held that succession to an intestate estate devolved immediately upon his death, and it was competent for the heirs at law to alienate the property pending the administration of the estate. Such alienation vested good title in the alienee subject only to be defeated by proper disposal of the property by the administrator in due course of administration. Later, in the case of *Ekanayaka v. Appu* [3 N. L. R. 350] it was held that when a creditor had a judgment against an administrator, the assets of the testator could not be held or disposed of by the heirs to their own advantage or to the detriment of the creditor. The question of the power of the heir to pass title without administration was fully considered in several recent cases, and it may now be accepted as settled law that if a person desires to prove title to property deduced through a former owner who has died intestate, he must prove one of two things, either that administration has been taken out, and that the administrator has conveyed the intestate's estate to him or to his predecessor in title, or that the intestate's estate was of less value than one thousand rupees, so that administration was unnecessary. It is not sufficient that both parties ignore the necessity of administration or even agree that it is not necessary. The court must be satisfied that in every intestate succession probate or administration has been taken; if not taken, that it was dispensed with owing to the smallness of the estate. The inconvenience and difficulty of insisting upon the administration of old estates

No title except through administrator.

are obviated by the enactment of the Prescription Ordinance which enables a person who has had over ten years' possession to protect himself by means of the provisions of section 3 [*Fernando v. Dochchi*, 5 N. L. R. 15; *Ukku v. Kalu*, 6 N. L. R. 299; *Gunaratne v. Perera*, 6 N. L. R. 373; *Punchirala v. Appuhami*, 7 N. L. R. 102]. It was held so early as 1866 that by letters of administration the legal estate in the property of the deceased vested in the administrator, and he alone was able to pass title. [*In re the Guardianship of Fidelis*, Ram. 1863-1868, 195.]

The law on this subject, so far as it regards the estates of persons who had died before the passing of the Civil Procedure Code, is, it may here be mentioned, to be amended shortly.

Acceptance or repudiation of an inheritance.

Every person appointed as heir under a will is at liberty to accept or repudiate the inheritance; and the inheritance does not descend on the heir, unless he does an act in his character as heir accepting it. The doing of such an act is called the committing *acte hereditaire.* When the party named as heir dies before such act, or even before notice of the succession, this right passes to his heirs [V. d. L. 1. 9. 10].

Adiation or repudiation in case of minors, &c., must be by guardians. &c.

In the case of women, wards, and minors the adiation or repudiation of an inheritance must be done by the guardians [Grot. 2. 21. 2].

Liabilities of heir.

An heir, on adiation of the inheritance, becomes liable for all bequests under the last will of the deceased just as though he had himself made a gift of them, and hence every legatee has not only a real right to the thing, but also a personal claim against the heir or heirs, just as though he had received a promise from him or them [Grot. 3. 26. 3]. The claim is against each heir in proportion to the inheritance, even though one of the heirs receives and benefits more out of the inheritance by way of prelegacy or otherwise than another. If a debtor who has promised to pass a

special mortgage for a debt on a certain piece of land, die before he has done so, and one of the heirs by division become sole owner of the land, the latter will be bound by himself to mortgage the land for the whole debt in accordance with the promise of the deceased [Grot. Tr. Maas. 439, n.].

The legatees and creditors retain the above right against all the heirs, even though they have sued one of the heirs for the whole debt [Grot. Tr. Maas. 439, n.].

Acceptance of inheritance by bankrupt.

The question has been mooted whether an English bankrupt succeeding to an inheritance in a Colony in which the Roman-Dutch Law prevails could be compelled to accept the inheritance for the benefit of his creditors. In the event of such compulsion, such bankrupt heir would, it is supposed, be entitled to be saved harmless by the assignees [V. d. L. Tr. Hen. 149, n.]. Where a bankrupt who was entitled to an inheritance but by the Civil and Dutch Law had had the right of repudiating, renounced in favour of his children, it was held that this was a fraud upon his creditors and that the right passed to them [V. d. L. Tr. Hen. 150, n.].

Since the heir by accepting the inheritance becomes tacitly bound for the payment of debts, &c., of the estate, though they may exceed its value, the law has, for his protection, provided two means—(1) The permission, before he determines to accept or repudiate, to take out a judicial act termed an *Act of Deliberation* or of *Non-Prejudice.* The effect of this is only to prevent any necessary acts done by the heir to ascertain the solvency of the estate from being construed as an *Acte Hereditaire* or of *Acceptance*, unless the acts were of such a nature as to alter or confound the property of the testator, and destroy it entirely, as for example, the making of payments after passing the act. Further, the operation of this act continues no longer than the creditors are content to wait, since they have in fact the right to compel the heir to accept or repudiate the

Act of deliberation

Benefit of inventory.

inheritance. (2) The application for the writ of Benefit of Inventory. This application was made to the Court of Holland if, after the act of deliberation and the consequent inquiry into the solvency of the estate, there still remained any uncertainty. On obtaining this writ the heir was at liberty to enter upon an uncertain estate and make an inventory thereof without being liable to the creditors and legatees beyond the real value of the property found therein [V. d. L. 1. 9. 10; Grot. 2. 21. 8 *et seq.*].

Revocation of wills.

A last will originally good, became void—(1) By express revocation by a subsequent will or by an act, attested by the same number of witnesses as is requisite to attest a will, whereby the party declared his intention to die intestate. In case the will contained the *Clausule derogatoir;* that is, a declaration that no subsequent testament should be good unless certain words used in the first will were therein found repeated, as for example, "Heaven be my inheritance," such subsequent will was nevertheless good whether those words were expressly repeated or whether it was made by a simple and entire revocation of the former will, although such former will contained a *Clausule derogatoir.* (2) The making of a second perfect will which although it contained no express revocation of the former will, was nevertheless a revocation thereof *de facto*, unless the intention of the testator appeared to have been that the former will should remain good wholly or in part. (3) The breaking of the seals and threads and envelope of a close will is held as a revocation. In an open will, however, erasures and alterations made by the testator in the *grosse* or notarial copy are not sufficient to cancel it, when he suffers the original minute of it to remain entire and untouched.

Death of heirs before testator.

(4) When the persons named by the testator as heirs happened to die before him, or refused or could not become heirs. In this case, however, the legacies had

to be paid, especially when the testament contained the clause that if it could not take effect as a will, it should at least be good as a codicil. This clause was termed the *Clausule Codicillair*. Where a husband and wife made a joint will whereby they gave the joint estate to the survivor, and after the death of the survivor to their three children in equal shares, the shares of any of the children who might predecease the testators to be inherited by their issue by representation, and two of the children mentioned predeceased both the testators without issue, it was held that the devise in favour of the children took effect only on the death of the survivor, and the devise failed as to two-thirds of the property as to which there was therefore an intestacy, and the same devolved on the next of kin as at the date of the death of the surviving testator [*Omer Lebbe v. Ebert*, 3. C. L. R. 5]. (5) When an unmarried person made a will and afterwards married and had children by the marriage, their birth amounted to a revocation of the will [V. d. L. 1. 9. 11. See Ord. No. 7 of 1840, sect. 5, *infra*].

By the destruction of the *grosse* or copy of the testament which is kept by the testator, the *minute* or original which remained in the protocol of the notary was not cancelled, unless it was proved that the testator had destroyed it with the view of dying intestate [V. d. K. 330; Grot. Tr. Herb. 167, n.]; and a will was not revoked by destruction where several copies of one and the same will had been made, and the testator tore up one copy only [Grot. Tr. Herb. 167, n.].

When a testament was invalid.

A testament was invalid *ab initio* if made by one who by law was incompetent to testate, or if all the formalities required by law had not been observed, or if no direct heir was instituted in it. These two last objects were generally remedied by inserting the *Clausula codicillaris* in the will. This clause converted the direct institution of heir, if the same was for some reason or other invalid, into a fidei commissary

institution chargeable upon the heirs *ab intestato.* If this remedy was not applied, the will, on account of the defects found in it, was invalid as a testament, and also invalid as a codicil [Grot. 2. 24. 4–7].

Clause that heir disputing will will forfeit his share.

A clause in a will that any heir under it disputing the directions of the will shall forfeit his share is valid, and not contrary to public policy. Such forfeiture, however, is not to take effect if it appears that there was reasonable and probable cause for disputing the will [*Fonseka v. Perera*, Ram. Rep. 1872–1876, 131].

Clausula derogativa.

The law does not allow a person the power to deprive himself of the right to make a will [Grot. 2. 24. 8; Voet 1. 3. 37]. But where there is a *Clausula derogativa*, noticed already, in a previous testament, it is necessary to refer to it in the later will in revoking the earlier one; otherwise there would be ground for suspicion that the subsequent will was extorted from the testator by compulsion or undue influence. The lapse of ten years after the making of the first will, the execution of the second will before the authorities, and such like indications, were also held as annulling such clause [Grot. 2. 24. 8].

Whoever claims an inheritance under a will is not bound upon production of it to prove that it has not been cancelled by any subsequent will, or that it is otherwise valid. He must rather do so who sets up that defence [Voet 5. 3. 5. See *Last Will of W. F. Morriss*, 6 N. L. R. 371].

As regards wills, testaments, and codicils, Ordinance No. 7 of 1840 provides as follows—

How wills are to be made.

No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, that it to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his

direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution; or if no notary shall be present, then such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary [sect. 3]. This section is an expansion to serve local conditions of section 9 of the Wills Act [1 Vic. c. 24], which provided as follows—"No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary." On this section it was decided that a will was not properly signed if there was any space left between the last line of the will and the signature of the testator. The result of the decisions was to invalidate a great number of wills, and it was accordingly provided by the Wills Act Amendment Act, 1852 [15 and 16 Vic. c. 24] as follows—"Every will shall, so far as regards the position of the signature of the testator, or of the person signing for him, be deemed to be valid within the said enactment [*i.e.*, the Wills Act—1 Vic. c. 26] as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will. that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will: and no such will shall be affected by the circumstance

Section 9 of the Wills Act.

Amendment as regards position on will of testator's signature.

that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." [See Agn. on Stat. of Frauds, 322]. This provision has not been taken over by us.

Incompetency of one witness.

One incompetent witness is sufficient to render the whole testament invalid, but then such witness must be one of the minimum number required by law. If there are more witnesses than are actually necessary, the will is not invalid if the number of competent witnesses correspond to the number required by law. The rest will be considered as surplusage [Br. Op. Grot. 185].

Witnesses not being present at the same time.

The witnesses to a will must be specially summoned, and must be present at one and the same time at the execution thereof, otherwise it will be set aside as

invalid. The rule is construed strictly; and, therefore, if the will is executed in one room, and the witnesses are in another, with the door leading from the one room into the other ajar, the presence required by law will be considered wanting, and the testamentary instrument void [see Br. Op. Grot. 185].

Witnesses must sign in presence of testator.

It is not sufficient for the valid execution of a notarial will that the testator signed in the presence of the witnesses; it is also necessary that the witnesses should subscribe the document in the presence of the testator. [*In the Matter of the Will of De Silva*, Ram. Rep. 1872–1876, 296].

Signature at top.

Attestation on detached paper.

A will signed at the top of the page was held to be invalid [Vand. D. C. 49]. The attestation of the notary and witnesses should not be on a detached piece of paper [*De Zylwa v. Auwardt*, 1 S. C. C. 28].

Circumstances giving rise to suspicion.

Where a will was attested by a notary who had never before been employed by the testator, and he [the notary] had taken an active part in directing the preparation of the will, and under the will his son received a large legacy and himself had a lucrative appointment as executor, it was held that these facts were sufficient to justify the Court in looking for more than ordinary proof of bare execution, and that opposition to the will was reasonable, and the opponent, though unsuccessful, should not be condemned in costs [*In* re *De Raymond*, Ram. 1863–1868, 168].

Costs of opposition.

Will acquiesced in by those interested.

A will though invalid by reason of defective execution may in time become binding by acquiescence of parties [3 Lor. 80].

Presence of notary and execution before five witnesses.

The mere presence of a notary when a will is executed before five witnesses as allowed by this section does not render it invalid. The words in this section, "if no notary shall be present," mean if a notary shall not be present in his notarial capacity, or in other words, if the will be not attested by a notary [*In the Matter of the Last Will of Abraham Perera*, 3 N. L. R. 306].

Presumption against forgery.

The presumption of law in the case of a will is against forgery and in favour of sanity [2 Lor. 33] and a claimant under a will, upon producing it in Court, is not bound to prove that it has not been cancelled by some subsequent will, or that it is otherwise valid [Re *Last Will of Morriss*, 6 N. L. R. 371]; but where, upon opposition, an issue is framed as to the soundness of the testator's mind, the burden of proof is upon the propounder of the will [*Fernando v. Pieris*, 2 Br. 228. See 5 L. R. P. D. 91].

Burden of proof on proponent to show soundness of mind.

Eccentricity of testator.

Evidence that a testator was eccentric and slovenly and dirty to an extent which could not be expected in any person who has a due sense of the decencies of life is insufficient to show that his state of mind was so far unsound as to render him unfit to make a will; and in matters of wills, while all due respect is to be paid to the skill and trained judgment of professional men, it is still the duty of the Court not only to hear their opinions but to inquire into the causes of their opinions and to learn the facts or supposed facts on which the opinions are founded [*In re De Raymond*, Ram. 1863–1868, 170]. See same case as to what constitutes unsoundness of mind.

Professional opinions.

Undue influence.

To set aside a will as the ground of undue influence the influence must be such as to destroy free agency [3 Lor. 251, sect. 3].

Execution of power of appointment by will.

No appointment made by will, testament, or codicil in exercise of any power shall be valid unless the same be executed in manner hereinbefore required, and every will, testament, or codicil executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, testament, or codicil, notwithstanding that it shall have been expressly required that a will, testament, or codicil made in exercise of such power should be executed with the same additional or other form of execution or solemnity [sect. 4].

No will, testament, or codicil or any part thereof shall be revoked otherwise than by the marriage of the testator or testatrix, or by another will, testament, or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will, testament, or codicil is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or testatrix, or by some person in his or her presence, and by his or her direction, with the intention of revoking the same [sect. 5].

How wills may be revoked.

The provision of this section with respect to the revocation of wills by the subsequent marriage of the testator does not apply to the case of a joint will made by persons married at the time of making their will; nor does it apply to a case where by the adiation of the inheritance of the deceased spouse by the survivor, the will of the survivor has become irrevocable [Re *the Estate of Johannes Muppu and his Wife*, 2 S. C. C. 14. See P. 16].

The provision as to revocation by subsequent marriage does not apply to joint wills of married person, nor where the surviving spouse has adiated inheritance under joint will.

A last will seen in the custody of the testator and not forthcoming at his death is presumed to be destroyed by himself *animo cancellandi.* But such presumption may be rebutted by evidence [Ram. 1871, 31]. Where in the absence of circumstances giving rise to such presumption a will has been irretrievably lost or destroyed, its contents may be proved by secondary evidence, and probate granted of a copy embodying the terms of the will [Ram. 1877, 34].

When destruction of will by testator may be presumed. Secondary evidence of last will.

No obliteration, interlineation, or other alteration made in any will, testament, or codicil after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will, testament, or codicil before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, testament, or codicil, with such

Interlineations, &c., in wills.

alteration as part thereof, shall be deemed to be duly executed if the signature of the testator or testatrix, and the subscription of the witnesses be made in the margin or some other part of the will, testament, or codicil opposite or near to such alteration, or at the foot or end of or opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will, testament, or codicil [sect. 6].

How revoked will may be revived.

No will, testament, or codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will, testament, or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary be shown [sect. 7].

Wills valid without publication.

Every will, testament, or codicil executed in manner hereinbefore required shall be valid without any other publication thereof, provided always that every such will, testament, or codicil shall, after the decease of the testator or testatrix, be duly proved and recorded in the district court empowered by the charter to grant probate or administration in such case according to such general rules of practice as may now or hereafter be made by the judges of the Supreme Court [sect. 8].

Wills not required to be registered.

A last will is not a "deed" which is required to be registered under Ordinance No. 6 of 1866, sect. 2, nor does the probate of a will fall within the description in that section [*Anthonisz v. Barton*, 7 N. L. R. 43].

Will attested by an incompetent witness.

If any person who shall attest the execution of any will, testament, or codicil shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof,

such will, testament, or codicil shall not be on that account invalid [sect. 9].

Devise to witness to will.

If any person shall attest the execution of any will, testament, or codicil, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, disposition, or appointment of or affecting any immovable or movable property, other than and except charges and directions for the payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, disposition, or appointment shall, so far only as concerns such person attesting the execution of such will, testament, or codicil, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as witness to prove the execution, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, disposition, or appointment mentioned in such will, testament, or codicil [sect. 10].

Attestation of will by person with whose debt property is charged by the will.

In case, by any will, testament, or codicil, any immovable or movable property shall be charged with any debt or debts, and any creditor or the husband or wife of any creditor whose debt is so charged shall attest the execution of such will, testament, or codicil, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, testament, or codicil or to prove the validity or invalidity thereof [sect. 11].

Executor attesting will.

No person shall, on account of his or her being an executor or executrix of a will, testament, or codicil, be incompetent to be admitted a witness to prove the execution of such will, testament, or codicil or a witness to prove the validity or invalidity thereof ; nor shall any executor or executrix by reason of his or her attesting such will forfeit the recompense or commission for his or her trouble payable by law, custom, or practice [sect. 12].

Wills of soldiers, &c.

Any soldier being in actual military service, or any mariner or seaman being at sea may, notwithstanding the provisions of the Ordinance, dispose of his personal estate as he might have done before the making of the Ordinance [sect. 13].

Will made before notary having no license to practise in district.

No will, testament, or codicil which shall have been made prior to the passing of the Ordinance shall be deemed or taken to be invalid by reason alone of the same not having been executed or acknowledged before or attested by a notary licensed to practise within the district wherein the land or property devised or to be affected by such will, testament, or codicil is situated, provided that every such will, testament, or codicil shall have been at the time of the date thereof duly executed, acknowledged before, or attested by a notary licensed to practise in some other district [sect. 14].

Disposal of property by will.

In Ceylon, under Ordinance No. 21 of 1844, every person competent to make a will may, by will, devise or bequeath all the property within this colony which at the time of his death may belong to him, or to which he may then be entitled, of whatsoever nature or description the same may be, movable or immovable, and all and every estate, right, share, or interest in any property, which, if not so devised or bequeathed, would devolve upon his heirs at law, executor, or administrator, to such person or persons, not legally incapacitated from taking the same, as he may desire to benefit. No will made either within or beyond the limits of this Colony is liable to be set aside as invalid or inofficious, either wholly or in part, by reason that any person who by any law, usage, or custom would be entitled to a share or portion of the property of the testator has been excluded from such share or portion, or wholly disinherited by or omitted in such will. Every testator, on the other hand, has full power to make such testamentary disposition as to him may seem meet, and, in the exercise of

such right, to exclude from the legitimate or other portion any child, parent, relative, or descendant, or to disinherit or omit to mention any such person without assigning any reason for such exclusion, disinheritance, or omission. Nothing in the Ordinance, however, extends to authorise or entitle any testator to dispose of by will any property or estate of his wife, or to exclude or deprive her of any life or other interest, belonging to her in her own right, in any property to which [property, estate, or interest] she would have been entitled had the Ordinance not been passed [sect. 1]. This provision practically abolishes the *legitime* or legitimate portion under the Roman-Dutch Law; and the proceeding known to that law as the *querela inofficiosi testamenti* has also, in consequence, disappeared. Where, by will, property is devised to a person legally incapacitated from taking thereunder, the heirs *ab intestato* may step in, and vindicate the property from those in possession of it claiming to hold it by virtue of authority, under the will. [See *Rabot v. De Silva, et al.*, 14,923, D. C. Colombo, S. C. Civ. Min., 30th May, 1904.]

The question of the right to devise property is not affected by the grant of probate [3 Lor. 9], and objection to the validity of a bequest in a will cannot be taken and adjudicated upon at the consideration of the application for probate [*In the Matter of the Will of Kathirkama Segara*, 5 N. L. R. 29].

Age at which a person may make a will.

No will made by any male under the age of twenty-one years or by any female under the age of eighteen years is valid, unless the person has obtained letters of *venia ætatis*, or unless he or she has been lawfully married [sect. 2].

Power of Governor to issue letters of *venia ætatis*.

The Governor of the colony has and enjoys within and over each and every district thereof all such rights and powers in respect of granting letters of *venia*

ætatis as were possessed and may lawfully have been exercised by him within the maritime provinces thereof at the time of the passing of the Ordinance [sect. 3].

Wills made out of the Colony.

Every will made beyond the limits of this colony containing any devise or disposition of immovable property situate within this colony, which has been duly made and executed according to and in conformity with the forms and solemnities prescribed by the law of the country where the same has been made and executed by any person who by the law of such country or of this colony is competent to make a will, is valid and effectual to alienate and pass the property in any immovable property so devised or disposed of by any such testator; and every will duly made and executed in manner aforesaid in any place beyond the limits of this colony by any person competent to make a will by the law of the place where he may be domiciled at the time of making and executing the same is valid and effectual to alienate and pass the property in any movable property bequeathed or disposed of by such will [sect. 4].

Will not executed according to Ordinance No. 7 of 1840.

A testator made his last will in Ceylon in 1884, and by it revoked a previous will, executed by him in England in 1880. The Ceylon will had been executed by the testator in accordance with the requirements of the law of England, and had been admitted to probate there, and it was held that the will of 1884, not having been executed in accordance with the provisions of Ordinance No. 7 of 1840, was ineffectual to pass the testator's property in this colony; and [by a majority of the Court] that the will of 1884 being inoperative in this colony, the will of 1880 could not be revoked thereby, and that effect should be given to the will of 1880 for the purpose of passing the Ceylon properties [*In* re *the Will of Grigg*, 8 S. C. C. 69].

Every will re-executed or republished or revived by any codicil is, for the purposes of the Ordinance, to be deemed to have been made at the time at which the same was so re-executed, republished, or revived [sect. 5]. Re-executed wills.

In all cases of marriages contracted either within any part of this colony or abroad without a nuptial contract or settlement, the respective rights and powers of the parties during the subsistence of the marriage in and about the management, control, disposition, or alienation of any immovable property situated in any part of this colony which belonged to either party at the time of the marriage, or has been acquired during marriage, and also their respective rights in or to such property or any portion thereof or estate or interest therein, either during the subsistence of the marriage or upon its dissolution, are in all cases to be determined according to the law of the matrimonial domicil. If the parties have entered into a nuptial contract by which their rights to and powers over any such property as aforesaid are ascertained, or by which either is declared entitled to any provision by way of dowry, &c., out of the separate estate of the other, then neither party would be entitled upon the dissolution of the marriage to any other or greater portion, provision or interest in or out of any such property as aforesaid than that provided for by such nuptial contract [sect. 6]. This section, it is to be noted, must be taken as repealed so far as it is inconsistent with the provisions of "The Matrimonial Rights and Inheritance Ordinance, 1876." Ante-nuptial contracts to be interpreted by law of matrimonial domicil. Terms of nuptial contracts to be given effect to.

All landed property in this colony belonging to two or more persons jointly, whether the same has come to them by grant, purchase, descent, or otherwise, is to be deemed to be held by them in common. Upon the death of any of such persons the property does not remain or belong to the survivor, but the interest of No survivorship as to property held in shares.

the person so dying forms part of his estate. Any person to whom such interest is devised or bequeathed, or on whom it devolves, becomes co-proprietor with the survivor or survivors in the property. If, however, the instrument under which the property is jointly held and possessed, or any agreement mutually entered into between the co-proprietors, has express provision that the survivor or survivors should become entitled to the whole estate, such provision has effect [sect. 20].

SECTION II.

FIDEI COMMISSA.

Definition.

A *Fidei Commissum* is defined in the *Censura Forensis* [1. 3. 7. 1] as a provision of one's last will by which a mandate is given to him to whom something is to come to give the whole or a part of it up to another, or to give something else. Van der Linden says—Sometimes a person is appointed heir under the condition that the property after his death shall pass to another. This is termed a *fidei commissum* [V. d. L. 1. 9. 8]. With this charge or condition the testator may affect all those who take any benefit under his will, except his children in so far as their legitimate portion is concerned. This must always remain free, and only that portion which exceeds it can be burthened with a *fidei commissum*.

Who may be affected by a *fidei commissum*. Legitimate portion of children.

It had, however, been introduced into practice that a father might put his child to the election to declare, and frequently under a judicial act, whether he would accept this legitimate portion free and unencumbered, leaving the residue to a third person, or would renounce it and in its place take a child's portion of the whole inheritance burthened with a *fidei commissum* [V. d. L. 1, 9. 8].

Right to legitimate portion removed by legislation.

This exception in favour of the children does not exist in Ceylon, since the rights of children, parents, and others to a "legitimate portion" have been removed by legislation here [Ord. No. 21 of 1844, sect. 1. See p. 313 *supra*].

May be imposed by act *inter vivos*.

A *fidei commissum* can be imposed not only by will but by an act *inter vivos* [Voet 36. 1. 9].

Fidei commissum property excluded from community, but husband may lease.

Fidei commissum property does not enter into the community of property between husband and wife, but the profits of such property enter into community, and a lease granted by the husband is good, not only in his lifetime but even after his death and during his wife's lifetime, where she is the fiduciary [1 Burge, 281; *Dharmagoonawardene v. Kutty Cangany*, 1. Tamb. 11].

Meaning of "children."

Whether in words constituting a *fidei commissum* "children" is to be understood as embracing grandchildren is to be judged from the circumstances of each case and other words and expressions used in the will. The question is one of fact rather than of law [Voet 36. 1. 22].

Legitimated natural children included in term "children" in *fidei commissum*.

Natural children who have become legitimated by subsequent marriage, even if that marriage took place immediately before the death of the heir, would be included in the term *liberi*, unless the testator's expressions admitted only of children born in lawful wedlock [Voet 36. 1. 14 ; 2 B. 107].

What may be subject to a *fidei commissum*.

The thing which is left by *fidei commissum* may be the testator's own property or that of the heir. It may be not only a corporeal thing, but even an incorporeal thing. It may even be a thing which manifestly belongs to a third party [*Cens. For.* 1. 3. 7. 4].

Different kinds of *fidei commissa*.

Fidei commissaire substitutions or trusts are of different kinds—(1) A pure *fidei commissum* under no condition. (2) A conditional trust or *fidei commissum* which only takes effect in a particular case, for example, in case the heir dies without issue. This condition is implied when any one, in the ascending line, burthens any of his descendants with a universal *fidei commissum*. (3) A *fidei commissum* in succession, when the substituted heirs are in like manner affected with a trust, or limitation, over to third persons. (4) A trust may be of the whole inheritance or of a part of some special property. (5) A reciprocal trust, when two persons are each mutually affected with a trust for the other. (6)

A trust of the residue, as when the heir is charged, in case he die without issue, to suffer the residue of the property at his death to pass to a third person. In this case he must suffer at least a fourth part of the original property to pass [V. d. L. 1. 9. 8].

Fidei commissum may take effect at the expiration of a certain period from death of fiduciary heir.

A *fidei commissum* may be so expressed as to take effect from a day, as at the expiration of ten years after the death of the fiduciary heir. Such a limitation would be void without the interposition of a *fidei commissum*, because the law would not permit the inheritance to remain in abeyance, or, in other words, for the ancestor to remain intestate during this interval. But by a *fidei commissum*, an heir is in the meantime instituted, who holds the inheritance until the fidei commissary becomes entitled to receive it [2 B. 107].

Fidei commissum with free power of alienation.

A *fidei commissum*, says Van Leeuwen [*Cens. For.* 1. 3. 7. 15], may be created with free power to the fiduciary heir of alienating the subject of the trust, as for instance, if any one be substituted heir on condition of giving up as much as remains, after his death, of the inheritance. In such a case no more than three-fourths of the property can be alienated, and even to that extent the alienation will be valid only so far as it is made in good faith and for necessity, and not for the purpose of defrauding the *fidei commissarii* or of evading the *fidei commissum* [*Cens. For.* 1. 3. 7. 15; Grot. 2. 20. 13]. If in such a case the fiduciary heir makes away with more than three-fourths, he and his heirs and, if need be, also the property last alienated may be proceeded against. He is also bound if required, and if not freed from the obligation by last will, to give security in that behalf. He may, however, if in want of a dowry or the property is necessary for marriage or for ransom of captives, alienate even the remaining fourth [Grot. 2. 20. 13]. Brothers and sisters are not bound to give security, as stated above, to each other, nor parents to their children [Grot. Tr. Maas. 155, n.].

Security to be given by *fiduciarius* for restitution of a fourth.

Brothers, sisters, and parents give no security.

Nor spouses who take under joint will.

Where spouses by joint will vest their property in the survivor with power of alienation, subject to the restitution of the residue to the heirs of both spouses, the survivor need not give security for the restitution of a fourth, and is at liberty to alienate the whole in his or her lifetime, but not by will. This power of alienation in the surviving spouse is effectual in so far as the alienation is made in good faith. It cannot be exercised with a view to defraud the substituted heirs [Voet 36. 1. 54, 56].

Alienation contrary to terms of *fidei commissum*.

When anything is alienated against the express prohibition of the testator, those persons in whose interest the prohibition has been made are immediately called to the *fidei commissum* [Sande de Proh. al. 3. 6. 1].

This proposition is liable to be misunderstood. The *fidei commissum* here referred to is a *fidei commissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being disregarded. Ordinarily, there need be no prohibition against alienation for the purpose of constituting a *fidei-commissum*, although in the creation of *fidei commissa* in Ceylon such prohibitions are usually inserted. If I give my property to A subject to the condition that it is to become B's property after the death of A, I create a complete and effectual *fidei commissum*. In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's rights, and he cannot therefore alienate the property. All that he can alienate is his own interest in it which terminates at his death. In such a case, if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is, after the death of A, whatever length of time may elapse since the alienation, no prescription beginning to run against him until the accrual of such right [Voet 36. 1.

64; Marsh. 192. See proviso to section 3 of Ord. No. 22 of 1871]. If, however, I give my property to A prohibiting him from alienating it, and providing that in the event of alienation the property is to go to B, here too a *fidei commissum* will be created, but the event on the happening of which the property is to vest in B is not the death of A, but the alienation of the property by A. If A does no act in contravention of the prohibition against alienation, the property will never vest in B. It will go to A's heirs after his death; but the moment A does such an act, B would *ipso facto* become the owner of the property. The reference in the passage cited above from Sande is to such a *fidei commissum*.

Alienation only on account of necessity or poverty.

A *fidei commissum* may also be effected with leave to alienate only on account of necessity or poverty. Here, the power of alienation is limited to the case where it is necessary in order to procure maintenance, and is not allowed when and so far as there is other property by means of which maintenance and other necessaries can be procured [*Cens. For.* 1. 3. 7. 15]. The permission, however, to alienate during one's lifetime does not include permission to alienate by testament [*Cens. For.* 1. 3. 7. 16]. At the same time a prohibition contained in a will against any alienation by act *inter vivos* is not to be extended to testamentary disposition [Voet 36. 1. 27].

Alienation by testament.

A prohibition of alienation by will is a charge on the property itself, and consequently those in whose favour it is made have not only a personal claim against the party alienating, but also a real right as against the property alienated [Grot. 2. 20. 12].

When several are prohibited from alienating.

When several are prohibited from alienating, the prohibition extends only to the part which each derives from the testator, and not to that which any one of those prohibited has derived from his co-heir, to whom also the prohibition had extended [2 B. 114; Voet 36. 1. 27].

Power to do what devisee likes with property.

A joint will of husband and wife gave the survivor power to do what he or she pleased with the property, and provided that whatever remained should be divided equally among the children; and it was held that the survivor could alienate the entirety of the property, but not by will, provided the alienation was made *boná fide*; and that the survivor was not bound to give security to the heirs for the restoration of any part of the property [*Ferdinandus v. Fernando*, 6 N. L. R. 328].

Legal age in *fidei commissa.*

When mention is made of legal or perfect age in testamentary dispositions, especially those instituting substitutions, it is only that age that by law constitutes majority that is to be taken as meant and not majority attained by favour of the Sovereign or otherwise [l. ult. C. *de his qui ven. ætatis impetr.*].

Universal or singular.

A *fidei commissum* is said to be universal, when it has for its subject the inheritance itself or a part of it; and singular, when it refers to particular things. A universal *fidei commissum* corresponds with inheritances, and a singular one with legacies, and is altogether on the same footing with them. As a general rule, whatever is said of instituted heirs may also be said of universal fidei commissaries. He to whom a fidei commissary inheritance has been given up is regarded as being in the same position as an heir; and as to those who may leave a *fidei commissum* and those to whom one may be left, the rule is the same as that which obtains in the case of the testator and heir, namely, that he only who has the power of making a testament may leave a *fidei commissum*, and that he may leave it to any one who has the power of demanding and taking under a testament [*Cens. For.* 1. 3. 7. 3].

No peculiar words necessary.

No peculiar words are necessary to create a *fidei commissum*, provided the person to whom the property is to go over is clear [V. d. L. 1. 9. 8]. When a testatrix by her will instituted certain heirs burdening property

devised to them with a *fidei commissum*, and by a subsequent codicil substituted other heirs in lieu of those originally instituted, it was held that the *fidei commissum* attached to the latter [3 Lor. 45].

A *fidei commissum* may be either express or tacit. It matters not what words are used, provided they express the legally valid intention of the testator who desires to create a *fidei commissum*. They may be imperative, as, "I order," "I command," or couched in the form of a request, as, "I ask," "I wish," "I entrust to your good faith," &c. In *fidei commissa* the only thing that is taken into account is the intention of the testator, and it is not only his verbally expressed intention that is looked to, but also that intention which is tacit, and may be deduced from the words used as a necessary or manifest consequence. An expression is to be taken as creating a *fidei commissum* which cannot be considered as having been made use of for any other purpose. It may be stated, as a rule, that whenever it is possible to gather from the words used an intention to create a *fidei commissum*, the condition of that person for whose interest the testator has shown least solicitude is never to be made better [*Cens. For.* 1. 3. 7. 7, 8].

Express or tacit.

Intention only to be taken into account.

As a general rule, says Voet, the presumption is that *fidei commissa* have been tacitly constituted in accordance with what seems to have been the testator's desire, whenever such presumption is the necessary inference from the terms employed. Thus, the following words in a will, provided they are addressed to the heir, may be taken as constituting a *fidei commissum*—"I believe [am of opinion or know] that the inheritance or the property will be restored to Sempronius"; "I ask you, my son, that with your accustomed diligence you set store by the property descending to you, and see to it that it descends to your sons" [Voet 36. 1. 10].

Examples of *fidei commissa* in local decisions.

A provision in a will that the property "shall for ever remain unsold and undivided, and the profits thereof be divided among the heirs collectively" was held to amount to a *fidei commissum*, the word "heirs" not necessarily meaning the children of the testator [Vand. D. C. 32]. Similarly, provision that the survivor should possess the common estate as he or she pleases, and that after the death of both, whatever is left should be divided among the children, constitutes a *fidei commissum* as to the residue. The survivor can alienate or encumber the property, but he or she should not needlessly spend, give away, or squander the estate in prejudice of the heirs on whom it is entailed. Under the Roman-Dutch Law it must not, in any case, be diminished by more than three-fourths [Vand. D. C. 203].

Fidei commissum as to residue.

A gift of land to A comprising a provision that the land "shall be possessed and enjoyed only by A, her children and their children in perpetuity, but shall not be sold, mortgaged, or gifted to any one," was held to create a valid *fidei commissum* [*Santiagopillai v. Chinnapillai*, 9 S. C. C. 33].

A and B being married in community of property "gave and bequeathed" to each other their joint estate to be possessed by the survivor during his or her natural life. The will further provided that after the death of the survivor they "gave and bequeathed" the said estate to their sons P and K; and it was held that this was not a bequest to P and K with merely a life interest in favour of the survivor of A and B, but that the survivor was made fiduciary heir to hold the property subject to a *fidei commissum* in favour of P and K [*Gould v. Souza*, 2 Br. 378].

No set form of words necessary.

No set form of words is necessary for creating a valid *fidei commissum*. Prohibition of alienation out of the family coupled with a clear indication of the person to whom the property, in the event of alienation, is

to go over, constitutes a good *fidei commissum* without formal words [*Anthonisz v. Barton*, 7 N. L. R. 43]. So also in the case of *Vansanden v. Mack* [1 N. L. R. 311] it was held by Bonser, C.J., that no special words were necessary to create a *fidei commissum*, but effect was to be given to the intention of the testator, if it could be collected from any expressions in the instrument that he intended to create a *fidei commissum*. In the same case Browne, A.J., was of opinion that the expression "my children and their descendants" differed in nowise from "my children and my descendants;" and it was also held by the court that whatever had been the intention of the testator as to the creation of a *fidei commissum*, where the will had been construed by the parties as if the testator had impressed a *fidei commissum* on the property, and such construction had formed the basis of family arrangements for a long period, it should not be disturbed.

Where in a joint will of husband and wife, after they had appointed the survivor the sole heir to all the common property, they willed as follows—"It is our will and desire that after the death of both of us to give and bequeath to our beloved son M" [land described]; it was held that the devise to M was contingent on his surviving both the testators, and that no interest vested in him after the death of one but before the death of the other; and so, he having married in community of property in the interval and died intestate, his wife could not maintain a claim to a half share of the land [*Joachino v. Robertu*, 9 S. C. C. 101].

The following words in a will—"I hereby direct that O and his posterity [*paramparawe*] should possess the following lands, &c. Except such possession, these lands or any part thereof shall not be sold, mortgaged, or made over in any other manner or

seized for his debt" were held to create a *fidei commissum.* The word *paramparawe* was interpreted to mean lineal descendants of the testator [*Ibanu v. Abeysekere*, 6 N. L. R. 344]. It was further held in this case that in construing a will the intention of the testator was of paramount importance, and where the intention to name a fidei commissary was expressed, or might be gathered by necessary implication from the language of the will, a *fidei commissum* was constituted. No particular form of words was necessary to create it, and in cases of doubt the inclination of the Court was not to put any burden upon the inheritance.

Intention of testator to be given effect to.

In the following cases the Judges were more or less adverse to constructions in favour of *fidei commissa.*

A deed of gift contained the following clause—I * * * authorise the said A and the heirs and administrators of his estate to possess the aforesaid two gardens, and also prohibit them, the said A and the heirs and administrators of his estate, from selling or mortgaging the aforesaid two gardens for any of their requirements"—and it was held by Fleming, A.C.J., and Lawrie, J., [*dis.* Dias, J.] that this clause did not create a *fidei commissum*, the person in whose favour the prohibition was declared not being sufficiently designated. Dias J., however, thought that the clause created a valid *fidei commissum* which was good for four generations [*Pina v. Sadris*, 7 N. L. R. 135]; and in *Weerasooriya v. Alles* [9 S. C. C. 32, note] Clarence, J., said that if another instrument thereafter contained a clause couched in terms similar to those cited above from *Pina v. Sadris*, he should be prepared to consider anew the question as to the constitution of a *fidei commissum.*

In *Aysa Umma v. Noordeen* [6 N. L. R. 173] the words were—"I * * * have given, granted, assigned, transferred, and set over unto them [A and B], their heirs, executors, administrators, and assigns, as a gift absolute

and irrevocable, all that portion of a house, &c., to have and to hold the said premises unto the said A and B, their heirs, executors, administrators, and assigns, and their children and grandchildren; and the children and grandchildren of their heirs and assigns shall not sell, mortgage, or encumber the said premises at any time, but hold and possess the same, and the rents, produce, and income thereof should not be held liable to be attached, seized, or sold for any of their debts, but they shall be able to give and grant the said premises or any part thereof in dowry for their female children, also subject to the aforesaid conditions and restrictions;" and it was held that there was no *fidei commissum* here, the persons to be benefited not being sufficiently designated, and the word "assigns" rendering it possible that the party to be benefited might be anybody in the world.

In *Dissanaike v. Dias* [1 C. L. R. 6] the owner of certain land granted it, by way of donation *inter vivos*, to a person, "his heirs, executors, and administrators," subject to the condition "that in the event of the donee happening to die without specially disposing of the aforesaid property by will or otherwise, or after marriage without lawful children or their legal descendants, it is to be clearly understood that no part of the gift hereby granted can be included in the community of goods of his wife, but that the same shall revert to the brothers and sisters of the donee or their lawful descendants *pro ratâ* according to the law of inheritance." It was held that the property vested absolutely in the donee.

Where a husband and wife made a joint will whereby the survivor was to possess their joint property according to his or her sole will and pleasure, and it was provided that after their death the property "shall not devolve upon or be vested in or claimed by any other relative, heir, or any other person whomsoever,

but all such property shall be owned and devolve upon A, our daughter as aforesaid, and shall be possessed free from dispute down to the generations of her children and grandchildren," it was held that the words did not create a *fidei commissum* [*Saibo v. Parys*, 1 Br. 229].

A gift in the following terms—"The above properties, movable and immovable, I gift to K and his sister P, the children of my sister, chiefly to be possessed by them and their uterine brothers and sisters by making a correct division of shares, or to do anything they please with them; and I, the said donor, have empowered all the children of my said sister to be possessed by them from this date, and that in future neither I nor my heirs could at any time revoke or alter this deed, nor do we (*sic*) dispute it, but the children of my said sister chiefly can possess, and their children and grandchildren in generations"—was held not to create a *fidei commissum*. The gift was held to be one to a class composed of the named donees and their uterine brothers and sisters then in being, and those who might come into being each to have his or her share, free to be disposed of the moment it vested, the share vesting in each child on its coming into existence [*Dias v. Kaithan*, 2 N. L. R. 233]. In this case Withers, J., queried whether the law allowed a gift to children *en ventre* or not *en ventre* and unborn.

Gift to children unborn.

By a deed dated the 18th November, 1876, the owner of certain immovable property gave it "as a gift absolute and irrevocable to his son M, his heirs, executors, administrators, and assigns," subject to the condition that M should "not be at liberty to sell, mortgage, or otherwise alienate the property gifted, but possess the same during his life"; and it was held that the deed did not create a *fidei commissum* for the benefit of the family of M, and that in consequence of section 3 of Ordinance No. 11 of 1876 [see *infra*] the words of

restriction mentioned above did not even impose a condition binding upon the donee [*Hermusjee v. Cassim*, 2 N. L. R. 190].

The following words in the joint will of a husband and wife were held insufficient to create a *fidei commissum*—"On the death of both of us, the donors, the above-named seven donees, or their heirs, &c., shall possess the said two lands thus gifted over, but shall not sell, gift, or mortgage the same, and on occasion of their necessity to lease the same they shall so lease among themselves, the above-named co-owners, but not to any outsider" [*Lushington v. Samarasinghe*, 2 N. L. R. 295].

Presumption against *fidei commissum*.

Where there is any doubt as to whether a substitution in a testament is direct or fidei commissary, the former is to be presumed to have been intended [Voet 36. 1. 1]. A *fidei commissum* is to be strictly interpreted, and its existence should not be lightly presumed [Voet 36. 1. 7]; and in case of doubt the court will assume that no incumbrance was intended [Br. Op. Grot. 229].

How a tacit *fidei commissum* may be created.

A tacit *fidei commissum* may be created by a testator merely enjoining his heir not to make a testament. Here, the testator is to be regarded as providing by these words that his heir is to permit the inheritance to devolve on the latter's heirs. A tacit *fidei commissum* arises too when a man who has made two testaments provides in the second that the first also is to be valid. In this case the first testament is revoked, but by reason of the clause inserted in the second the inheritance is to pass by virtue of a *fidei commissum* to those who have been instituted in the first testament [*Cens. For.* 1. 3. 7. 9].

Provision that a child's portion may go to its full brothers.

A provision in a will as follows—"In the event of the decease of any of my children by the first marriage, such child's inheritance shall go to its full brothers and sisters on the mother's side to the exclusion of the half-brothers and sisters"—does not constitute a *fidei*

commissum, but merely prescribes or defines the succession *ab intestato* in case the children failed to dispose of their property by will, though of an age when they were competent to do so [Voet 36. 1. 5].

Condition—"If he die without children."

Where a *fidei commissum* is created subject to a condition such as this—"If he die without children"—the question arises whether legitimised or natural children would exclude the fidei commissary. It seems that children legitimised by subsequent marriage and natural children who in certain circumstances have the same rights as legitimate issue, as for instance natural children, in respect of the property of their mother, would. But natural children not so circumstanced would not exclude the fidei commissary, nor would children legitimised by rescript of the sovereign, unless the testator had been consulted as to their legitimation, and had consented thereto [*Cens. For.* 1. 3. 7. 17].

Voet says that where the *fidei commissum* is subject to the condition of the instituted heir dying "without children" lawful children are intended, whether the fiduciary is a male or female, unless the circumstances of the case lead to a different conclusion. These circumstances have to be more carefully examined where the fiduciary is a female, inasmuch as natural and illegitimate children are, by law, allowed to succeed to her *ab intestato* [Voet 36. 1. 13].

In the case of a *fidei commissum* subject to the condition "if he (the fiduciary heir) die without children," the condition is defeated by the legitimation by marriage of natural children, unless the condition further expressed that the children were to be those born in lawful wedlock. Children legitimated by rescript of the sovereign would also defeat the condition, if either the testator or the fidei commissary consented to such legitimation [Voet 36. 1. 14]. This condition would also be defeated by the fiduciary heir leaving

any one child or grandchild behind him, and also by the birth of a posthumous child, but not by his having had children who had predeceased him [Voet 36. 1. 15].

Where fiduciary dies along with his children.

If the fiduciary had perished along with his children in one and the same accident, such as shipwreck, the law presumes in favour of the *fidei commissum*, for example, in the case of the *fidei commissum* mentioned above, that the children predeceased the father. This presumption may, however, be rebutted by evidence [Voet 36. 1. 16].

In the case suggested above, namely, where a *fidei commissum* is subject to the condition *si sine liberis*, it is further a question whether in the event of the *fiduciarius* having children they are to be considered as taking the place of the *fidei commissarius*. In other words, is the provision to be construed as creating a *fidei commissum* in favour of the children. The better opinion seems to be that it is not to be so construed, unless from clear inferences and necessary deductions it appears that the testator intended otherwise, as for instance, if the children themselves who are mentioned in the condition have also had any burden imposed upon them [*Cens. For.* 1. 3. 7. 18].

Property bequeathed to J, and, if J die without children, to P.

The position is put by Grotius thus—When a person says "I bequeath my property to John, and if John dies without children I desire that it shall go to Paul," it is understood that if John dies before the testator his children are to be preferred to Paul; but whether John, having become heir, is bound to leave the property to his children, is doubted. The most general opinion, however, is that such is not the case unless the children are descendants of the testator or are found to be themselves charged with the payment of some legacy, or unless there is some other indication in the will from which such an intention can be inferred [Grot. 2. 20. 5].

Where condition *si sine liberis* is implied.

The condition *si sine liberis* is in certain cases implied, when it has not been expressed. If a father or grandfather institute his son or grandson who at the time has no children with a *fidei commissum* to restore the inheritance to a third person, this condition *si sine* is implied, for the presumption is that the testator had unintentionally overlooked his grandchildren, on whom he must have wished the succession to devolve, rather than on a stranger [Voet 36. 1. 17]. But the grounds on which this condition is implied fail, if the son or grandson has a child living at the time of the institution and no mention is made of him: or if the testator has two sons, and adds the condition *si sine liberis* in making a substitution in respect of one, but omits it in making substitution in respect of the other [Voet 16. 1. 18; 2 B. 109]. Nor is such a condition implied, if a child institute his parents or his brother with a *fidei commissum* in favour of another, nor is it implied when a stranger is instituted jointly with the son [2 B. 109; Voet 16. 1. 19].

Where a father charges his son to restore inheritance to third person.

Where a father or grandfather charges his son or grandson whom he has appointed heir, and who is childless, to restore the inheritance to a third person, the condition of the death of the heir without children is implied, and he is not held bound by the testator's wishes to make restitution unless he die without leaving children. The same condition *si sine liberis* is implied in the case of a bequest to a charity. The bequest is defeated by the fiduciary leaving children surviving him [Voet 36. 1. 17].

This condition is not implied where at the date of the institution the fiduciary had children [Voet 36. 1. 18].

Children called collectively with parents.

When children are called collectively along with their parents to an inheritance, as for instance, where a testator creates a *fidei commissum* in favour of his sons and their heirs, or in favour of his brothers and their

children, the heirs in the former case and children in the latter are not to be regarded as being called to the inheritance along with the sons and brothers respectively, but they will succeed in the same order as is observed in intestate succession; and they are not to be considered as having been called to the inheritance according to the heads, but according to stocks by representation [*Cens. For.* 1. 3. 7. 19].

In the case of *Raymond v. Sanmogam* [3 S. C. R. 52] the will contained the following devise—"I do hereby give * * unto my daughter H all that house * * subject to the following condition, that is to say, that the said H shall have the free use * * of the said premises * * and at her death the same shall revert to my grandson J and his lawful issue;" and it was held that the words "lawful issue" must be considered as words of substitution, and that the two sons of J had no present and immediate right to the premises as co-tenants with their father, and that their right to possession accrued only on his death.

Fidei commissaries succeed according to rules of intestate succession.

Where a testator who creates a *fidei commissum* does not arrange a definite order of succession, the fidei commissaries succeed according to the order and rules of intestate succession [*Cens. For.* 1. 3. 7. 20].

Meaning of next of kin.

Where a testator by *fidei commissum* substitutes in unqualified terms his next of kin, the next of kin generally would be considered as intended and not merely next of kin who would be the rightful heirs *ab intestato*, unless words are used to imply the latter [Voet 36. 1. 25].

Next of kin as *fidei commissarii.*

Where a husband appoints his wife a fiduciary, imposing on her the burden of making restitution to his next of kin after her death, the better opinion is that the next of kin intended are those who would be such at the time when the condition is satisfied, namely, the death of the fiduciary, and the next of kin dying

before that would not transmit to their heirs the right of succession [Voet 36. 1. 26.]

Death of beneficiary before fulfilment of condition of bequest.

As a general rule a bequest made to a certain person subject to a condition lapses, and cannot be transmitted to his heirs where the beneficiary dies while the condition is still pending [*Ibid.*].

Fidei commissum fails by the happening of a fortuitous event, *e.g.*, if the fidei commissary heir die during the pendency of the condition on which the *fidei commissum* depends, unless there be some evidence of a contrary intention on the part of the testator, whether that be express, in that he ordered that on the fidei commissary dying before the fulfilment of the condition his heirs should succeed him in respect of the expectation of the *fidei commissum*, or whether it be tacit, inferred from considerations of family affection. And so, when a father had instituted his sons A and B as his heirs, and had reciprocally substituted the one as heir to the other by *fidei commissum*, no express mention or substitution being made of the children to be begotten by them, but had substituted to him who should be the last of the instituted heirs to die without male children, his [the testator's] daughters and their children, the male children begotten by A who died first must be understood to be substituted to B who afterwards dies without children. It is here to be presumed from the preference shown by the testator to his sons [A and B] that he intended to benefit their sons before benefiting his daughters and their children [Voet 36. 1. 67].

Accrual in favour of heirs of *fidei commissarius.*

Where a testator gives his estate to his son to be held subject to a *fidei commissum* in favour of his [the testator's] two daughters and his grandchildren by a predeceased daughter, and one of these two daughters dies before the fiduciary leaving children, these children share in the property with the other *fidei commissarii* [Voet 36. 1. 23].

If a person who appoints as his heirs his children or brothers express his desire that the share of one who dies without children should accrue to the remaining co-heirs and their heirs *ab intestato*, the heirs of pre-deceased co-heirs will be allowed to take along with the surviving co-heirs [Voet 36. 1. 24].

Fiduciary cannot select person to benefit from among several *fidei commissarii*.

When the persons to whom restitution is to be made are named in a *fidei commissum*, no power of selection is given to the fiduciary in the absence of words implying such power [Voet 36. 1. 29].

Mere prohibition against alienation.

A *fidei commissum* is not created by a mere prohibition against alienation, unless the prohibition be against alienation out of the family [V. d. L. 1. 9. 8; *Cens. For.* 1. 3. 7. 10; Voet 36. 1. 27]. The persons to benefit must be named or designated; but in the case of a mere prohibition against alienation, if the testator state the ground of the prohibition or his reason for it, as for instance, if he forbid the alienation of the property in order that it may be preserved and remain in the family, then a *fidei commissum* is to be presumed to be created in favour of the family [*Cens. For.* 1. 3. 7. 10]. And where a *fidei commissum* is to be deduced in favour of one's family or blood relations generally, the nearest relations of the last possessor who are also related to the testator succeed on intestacy. It is not nearness of relationship to the testator who has imposed the burden, but proximity to the last possessor on whom the burden has been imposed, that is taken into account. This proposition, however, is not of universal application, and has been the subject of some considerable discussion.

Alienation out of the family.

The words, "that the property is not to be alienated out of the blood relations," were regarded as creating a *fidei commissum* in favour of blood relations, except at Amsterdam, where such words were held as merely pointing out how the property was to go in case of intestacy, and so far as the same has not been alienated *inter vivos* [Grot. 2. 20. 12].

Where the testator has shown no indication as to the order and mode of succession, he is considered as having left these to be settled by the ordinary law of intestate succession in force in the country [*Cens. For.* 1. 3. 7. 11 *et seq.*]. A *fidei commissum* of this and similar kind is not, as a general rule, perpetual. It only extends to the fourth degree of succession counting from him to whom after the death of the first heir the inheritance has come saddled with the burden up to the fourth degree beyond him inclusive; that is to say, the person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so [*Cens. For.* 1. 3. 7. 14; Grot. 2. 20. 11]. When, however, the will of the testator is perfectly clear, and creates a perpetual and successive *fidei commissum*, it is supposed to continue to be permanently in force [*Cens. For.* 1. 3. 7. 14. But see Voet ad Pand. tit. ad. S. C. Trebell. num. 33; Grot. Tr. Maas. 154, n.].

Further degree of succession.

Perpetual *fidei commissum.*

Jus accrescendi.

When the whole or a certain part of a *fidei commissum* is left to several in conjunction, the right of accrual has place among them [*Cens. For.* 1. 3. 7. 21; Voet 36. 1. 71]. This principle was given effect to by the Privy Council in the case of *Tillekeratne v. Abeyșekere* [66 L. J. P. C. 55; (1897) A. C. 277; 76 L. T. 210—P. C.; 2. N. L. R. 313]. There A and his wife B made a joint will in 1858, the portion of which material to the present subject was as follows—"All the movable and immovable property belonging to us shall be possessed by the survivor of us, after which the three children of C [the deceased of our two children], namely, D, E, and F and our second daughter G shall divide into two and inherit according to custom, they and their descendants, and possess without interruption." D and E survived both their grandparents [A and B]. F survived A but predeceased B, leaving him surviving his wife and a child K, who now claimed a sixth share of

the estate on the ground that she had succeeded her father; but it was held that the moiety settled upon the grandchildren D, E, and F was subject to one and the same *fidei commissum*, and that the bequest was not in the form of a disposition of one-third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly with benefit of survivorship and with substitution of their descendants, and also that Ordinances Nos. 21 of 1844, 10 of 1863, and 7 of 1871 had in no way altered the law of *fidei commissum*. The claim of K was accordingly dismissed. It must here be noted that section 7, that the Privy Council cites in its judgment, of Ordinance No. 21 of 1844 had been repealed by Ordinance No. 11 of 1852.

If a thing is to be preserved intact and disintegrated for the benefit of coming generations, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of Ordinance No. 21 of 1844, section 20, will be suspended until either there is no possibility of succession or until the term fixed for the *fidei commissum* has expired [*Vansanden v. Mack*, 1 N. L. R. 311].

Jus accrescendi in case of co-legatees.

The case of survivorship or *jus accrescendi*, says Mr. Morice in his work on the English and Roman-Dutch Law, arises in the event of failure of one or more of several co-legatees; *e.g.*, by predeceasing the testator. The question must then be decided whether the whole of the thing bequeathed goes to the survivor or survivors, or whether the deceased legatee's share falls back into the estate. The general answer is that this depends upon the intention of the parties. As Sir Henry de Villiers says in *Potgieter v. Executor of Van der Heever*

[12 S. C. 40], all rules for the interpretation of wills are founded upon the presumed intention of parties. But there are certain technical rules for ascertaining the intention of testators which are given by Voet [30. 1. 59–62]. The legatees may be associated (1) *re tantum*, (2) *re et verbis*, and (3) *verbis tantum*. The first case occurs where a testator bequeaths an article to A, and in another part of the will to B. In that case the *jus accrescendi* applies. If A or B predecease the testator, B or A respectively takes the whole thing. An example of the second case is where a will bequeaths a thing to A and B without mention of the shares. In such a case there is also a *jus accrescendi*. In the third case where an article has been bequeathed to A and B in equal shares or in specified shares, there is no *jus accrescendi* [Mor. on Eng. and R.-D. Law, p. 287].

Restitution before happening of the event.

A fiduciary heir may make restitution to the *fidei commissarius* even before the happening of the condition which suspends the *fidei commissum*, but then such restitution operates to only this extent, namely, that the fiduciary alone is damnified by it. It cannot prejudice persons who on the happening of the event constituting the condition of the *fidei commissum* would acquire the property in consequence of the death before that of the *fidei commissarius* or in consequence of any other contingency. Thus where property is given to A with a *fidei commissum* in favour of B to operate on the death of A, the latter cannot in his lifetime make restitution of the property to B, so that in the event of B predeceasing A, B's heirs may inherit the property [see Voet 36. 1. 34].

Fidei commissarius dying before fiduciary heir.

The person to whom the limitation over of the enjoyment of anything is made must wait until the event takes place on which such limitation is to take effect: as, for example, the death of the heir under the will. He must, however, be at this time in a capacity or state to take as substituted heir; and this limitation

in his favour is not such a vested interest in him as to pass to his heirs when he himself is not entitled at the time of the event, as, for example, if he die before the heir under the will [V. d. L. 1. 9. 8].

But as to this event Voet draws a distinction between a *fidei commissum* created by will and one created by an act *inter vivos*. He says [36. 1. 67. see also Marsh. 192] that a *fidei commissum* terminates by the death of the *fidei commissarius* before the accrual of his interest, unless the intention of the testator is otherwise expressed, or unless the *fidei commissum* is by an act *inter vivos*, in which case the contingent interest goes to the heirs of the *fidei commissarius* [see also *Gould v. Souza*, 2 Br. 378 ; *Tillekeratne v. Abeysekere*, 2 N. L. R. 313].

Difference as to this between a will and an act *inter vivos.*

Where a testator institutes his son with a *fidei commissum* in favour of his two daughters and the children of a deceased daughter in the event of the son's death without children, and one of the daughters dies leaving children, and afterwards the son dies without leaving children, then, not only the surviving daughter and the grandchildren by the daughter who had died before the will was made, but also the children of the daughter who has died subsequently are entitled to the benefit of the *fidei commissum*. The testator has evinced his intention that the children should succeed in the place of their deceased parent, and in this case the grandchildren would be included [2 B. 110].

If a person institute children or brothers as co-heirs under a *fidei commissum* that if either of them died without children his share should go to the other co-heirs and their successors *ab intestato*, and one dies without leaving children, but leaving surviving him some of his co-heirs, and the successors of others of the co-heirs who had died, the successors of those who were dead would, together with the surviving co-heirs, be entitled to the share of him who died without children

by that species of representation which the will of the testator and not the law in this case introduced [2 B. 110].

Fidei commissum and usufruct.

An heir affected with a trust has a real though burthened right of property, and thus differs from him who has a mere usufruct in the subject of which the naked right of property is in the meantime left to another, who may leave it to his heirs although he die before the *usufructuarius*. In the meantime it is also incident to a trust that the heir, so long as the trust cannot be executed, enjoys the fruits of the property, and that he retains the whole under his disposition except when the testator has appointed a special administrator [V. d. L. 1. 9. 8].

A mere usufruct is often mistaken for a *fidei commissum*. When the usufruct of an inheritance is bequeathed to any one for life with the proviso that he is to give the inheritance over to another, the word "usufruct" is not to be understood in the sense of an encumbered ownership [Grot. 2. 20. 14]. In the case of a bare usufruct the ownership immediately on the death of the testator is considered as acquired by those who at the time were the next of kin of the deceased or whom he in his last will declared his universal successors at law, so that even if they die during the existence of the usufruct, they nevertheless transmit their ownership and their hope of becoming full owners to their heirs. This is not the case when full ownership with the burden of *fidei commissum* or of making restitution after the death of the fiduciary is understood to have been left; for the *fidei commissarius*, who dies during the lifetime of the *fiduciarius*, does not transmit his chance of obtaining the *fidei commissum* to his heirs, but restitution is made to those who are alive at the death of the fiduciary; and if none such survive, to whom restitution should be made, the fiduciary is taken to be released from the burden of *fidei commissum*, and he

can then alienate the property as if unburdened, or transmit the full right of ownership to his next heirs [Voet 7.1.13; see also 36.1.16].

How fiduciary heir is to use the property.

The fiduciary heir must exercise his power over the property as a good father of a family, and preserve the trust property in a proper state, and make a proper inventory, and give security to the party in expectancy for the delivery of the property when his possession and title expire [V. d. L. 1.9.8].

Fiduciary may acquire servitudes, &c.

A fiduciary may acquire servitudes for the benefit of the fidei commissary property, and may liberate it from servitudes which have been imposed on it. The alienation of houses which were held subject to a *fidei commissum* and were falling in from age was permitted on an order of court on the condition that the money obtained therefrom should be expended on some investment which was to take the place of what had been alienated and become fidei commissary property [Voet 36.1.63].

Alienation in ignorance.

If a fiduciary who alienates property which is subject to a *fidei commissum* and the alienee were ignorant of the existence of the entail, and that ignorance was, in any way, due to the action of the testator, the alienation will be allowed to stand, the heirs of the fiduciary being liable to damnify the *fidei commissarius* [Voet 36.1.63].

Right of fiduciary in respect of improvements.

In making restitution on the happening of the event on which *fidei commissum* property passes to the *fidei commissarius* the fiduciary heir is entitled to compensation for monies spent for the permanent preservation of buildings or the restoration of those which have been burnt down or have fallen in, and for the payment of a debt of the inheritance or legacies and the like, but not for everyday repairs. He can deduct the amount of that expenditure and those improvements. the deduction of which has been allowed to the *bonâ*

fide possessor and quit-rent owner [*emphyteuta*] after the expiry of the tenure. He has, moreover, not only the right of retention until such compensation is paid, but also an action for the expenditure, and he is not bound to allow, except in certain circumstances [as to which see Voet 36. 1. 49] fruits which have been gathered to be set-off against expenditure and improvements [Voet 36. 1. 61].

Alienation for payment of debts or with consent.

The person who is in the enjoyment of the property thus burthened has no right to incumber or alienate it at his pleasure, but only for the payment of debts which are a charge upon the property itself, or with the consent of all the parties in expectancy, or for purposes of absolute necessity. In this last case a previous decree of the court is necessary [V. d. L. 1. 9. 8].

It has been held that the approval of the court to mortgage the property to pay taxes, and for improvements must be obtained by proceedings under the Entail and Settlement Ordinance, 1876 ; otherwise, it is valueless, and a sale in execution in discharge of a mortgage for which approval of the court has been irregularly obtained will be invalid. Voet says that *fidei commissum* property cannot be alienated except to pay the debts of the testator and the legacies left by him, and that only in case no other funds are in anywise available for the payment of these, unless those who are interested in the *fidei commissum* give their consent thereto [Voet 36. 1. 62].

Alienation for payment of debts.

Effect of alienation by fiduciary.

When a fiduciary alienates property subject to a *fidei commissum* he cannot reclaim it in the event of a lapse of the *fidei commissum* owing to a failure of the condition to which it is subject. On the contrary, the fidei commissary heir might maintain an action against him for restitution on the fulfilment of the condition [Voet 36. 1. 62].

The property which it was not competent for the fiduciary heir to alienate may be recovered by the fidei commissary, nor will he be barred by any length of time which may have intervened between the alienation and the happening of the event, or the performance of the condition on which his title accrued, because until then he could not interpose to assert his right [Voet 36. 1. 64]. Under Ordinance No. 22 of 1871 the period of prescription in respect of land begins to run against parties claiming estates in remainder or reversion only from the time when the parties so claiming acquired a right of possession to the property in dispute.

No prescription against fidei commissary until property vests in him.

The fiduciary heir cannot, in making restitution of the inheritance, deduct therefrom a debt due to him by the deceased [Voet 36. 1. 36].

Debt due to fiduciary.

When the event takes place on which the property is to be given over, the heir must suffer it to pass to the person to whom it is limited, saving however to the heir his right at law to deduct and retain a fourth part, which is termed the *Trebellian portion.* This legal right is, however, in most cases, expressly barred by the will. A double deduction, that is, a deduction of the legitimate as well as of the *Trebellian portion*, was by the canon law permitted to children who were burthened with a universal trust [V. d. L. 1. 9. 8. See Grot. 2. 20. 6 *et seq.*].

Trebellian portion.

The *fidei commissum* or trust ends—(1) By failure of the condition upon which it is made. (2) When the person in expectancy dies before the heir, or becomes incapable or disqualified to take, that is, by the death of the fidei commissary before the fiduciary [see Voet 36. 1. 16]. (3) By the perishing of the trust property without fault of the heir. (4) By the express renunciation of the party in expectancy. (5) In case the heir thus charged with a trust dies before the testator, and thus the appointment of heir itself fails. (6) By a

How *fidei commissum* ends.

release from the trust which can only be detained from the Sovereign, and only for lawful reasons, and on the consent of all the parties in expectancy [V. d. L. 1. 9. 8].

Determined by renunciation.

A *fidei commissum* is determined by its repudiation by the fidei commissary and by renunciation or surrender on the part of all those on whom the *fidei commissum* ought to devolve on the fulfilment of the condition [Voet 36. 1. 65].

Death of *fidei commissarius* before fulfilment of condition.

A *fidei commissum* fails by the death of the fidei commissary heir during the pendency of the condition on which the *fidei commissum* depends. He does not in that event transmit the expectation of the *fidei commissum* to his heirs, unless there be some evidence of a contrary intention on the part of the testator, whether that be express or tacit, inferred from considerations of family affection. Where, however, the *fidei commissum* has been created not by will but by act *inter vivos*, such as a pact added to a donation *inter vivos*, the better opinion is that in the event of the fidei commissary successors designated in the pact dying before the fulfilment of the condition, they transmit the expectation of the *fidei commissum* to their heirs [Voet 36. 1. 67].

Where fiduciary dies before testator, and where he declines to take.

The *fidei commissum* also fails if the fiduciary heir die before the testator [Voet 36. 1. 69]. Where, however, the *fiduciarus* neglects or refuses to take the trust upon himself, the *fidei commissarius* is admitted as of right [Voet 36. 1. 46; Marsh. 190].

Entail and Settlement Ordinance.

In Ceylon, Ordinance No. 11 of 1876 amends the law regulating the entail and settlement of immovable property. Under it, no prohibition, restriction, or condition against the alienation of any immovable

Prohibition against alienation, how far effectual.

property declared or contained in any will, deed, or other instrument executed after the proclamation of the Ordinance is effectual to prevent or restrict the alienation of such property for a longer period

than the lives of persons who are in existence or *en ventre sa mère* at the time of its execution and are named, described, or designated in it, and the life of the survivor of such persons [sect. 2]. Any such prohibition, restriction, or condition against alienation as aforesaid is null and void, so far as it prohibits or restricts alienation for a longer period than that limited in section 2. But where the will, deed, or instrument in which any prohibition, restriction, or condition against alienation is contained does not name, describe, or designate the person or persons in whose favour or for whose benefit it is provided, then such prohibition, restriction, or condition is absolutely null and void [sect. 3].

Person to benefit should be designated.

District Court may allow sale, &c., of entailed property.

When immovable property is held under or subject to any entail, *fidei commissum*, or settlement, whereby its alienation is prohibited or in any way restricted, the District Court of the district in which the property is situate may, from time to time, authorise a lease, exchange, or sale of the whole or any part of the property upon such terms and subject to such conditions as the court may deem expedient. Every such lease should be made to take effect in possession at or within one year next after the making thereof, and should be for a term not exceeding twenty-one years, and on it should be reserved the best rent or reservation in the nature of rent that could be reasonably obtained to be payable half-yearly or oftener to the person or persons then lawfully entitled to the same without taking any fine or foregift or other benefit in the nature of a fine or foregift [sect. 4].

Who may apply for such sale, &c.

Any person entitled to the possession or to the receipt of the rents and profits of any immovable property subject to any entail, *fidei commissum* or settlement, or of any share thereof, may apply to the District Court by petition in a summary way to exercise the powers conferred by the Ordinance [sect. 5].

Notices to parties interested.

Before making an order authorising a lease, exchange, or sale as aforesaid the District Court should require such notice, as it may deem expedient, of the application to be given to all parties interested who may be living at the time and whose place of abode can, after reasonable inquiry, be ascertained; and any person interested may appear before the court, and show cause against any proposed order [sect. 6].

Proceeds of sale, how to be applied.

Proceeds of sale under the Ordinance may be applied to some one or more of the following purposes—(1) The discharge or redemption of any charge or incumbrance affecting the property, or affecting any other property subject to the same entail, *fidei commissum*, or settlement; (2) the purchase of other immovable property to be settled in the same manner as the property in respect of which the money was paid; (3) investments in the Loan Board or in Government securities, the interest thereof being made payable to the party for the time being otherwise entitled to the rents and profits of the land sold; or (4) the payment to any person becoming absolutely entitled [sect. 7].

Property taken in exchange subject to same entail.

Any property taken in exchange for any property exchanged under the provisions of the Ordinance becomes subject to the same entail, *fidei commissum*, or settlement as the property for which it was given in exchange was subject to at the time of such exchange [sect. 8].

Who should execute lease, &c.

On every lease, exchange, or sale, the court may direct what person should execute the deed of lease, transfer, or assurance; and the deed executed by such person takes effect as if all the persons interested or who might become interested in the property under the will or instrument by which the entail, *fidei commissum*, or settlement was created had joined in it.

Costs of legal proceedings.

The court may also direct by whom and in what proportions the cost of the deed and of the proceedings

under the Ordinance should be paid. The costs may be recovered in the same way as costs in ordinary civil actions [sect. 9].

Appeal.

Orders of District Courts under the Ordinance are subject to appeal [sect. 10].

Stamp duty.

Petitions to District Courts under section 11 should bear a stamp of ten rupees; but no other stamp duty is leviable for any legal proceedings under the Ordinance [sect. 11].

Lands held by charitable institutions. &c.

The Ordinance does not apply to immovable property held or possessed by, or to any grant, devise, or conveyance to or for the benefit of, any corporation, joint stock company, church or temple, or any charitable, religious, or educational institution [sect. 12].

Trusts.

Fidei commissa were the only trusts fully recognised by the Roman-Dutch Law and exhaustively treated on by writers on that law. They were chiefly testamentary in their constitution; but, as laid down by that eminent authority, Mr. Berwick, late District Judge of Colombo, in *Saibo v. The O. B. C.* [3 N. L. R. 152] it cannot be denied that in the ordinary course of development of our Colonial Law, to overtake the circumstances of modern life, express trusts *inter vivos* are now as much part of the legal system of Ceylon as of England, though virtually unknown in the practice of the old Civil Law.

Ordinance No. 7 of 1871, as amended by Ordinance No. 2 of 1889, makes provision for the nomination of trustees in certain cases, the vesting of property in new trustees, the registration of trustees, &c.

Difference between trusts and *fidei commissa.*

The most essential difference between trusts and *fidei commissa* may be expressed as follows—In trusts the interests of the trustee and the *cestui que trust* are co-existent in time; in *fidei commissa* they are successive. Most of the points of difference between trusts and *fidei commissa* are corollaries from this principle. Thus the trustee has no beneficial interest,

only the *dominium;* the fiduciary has as a rule a beneficial interest and the *dominum* as well. In Dutch Law the legal and beneficial interest or legal and equitable estates had not been distinguished. They were not conceived as existing in separate persons at the same time as in the case of the English trust. The fiduciary united both interests for the time being [Mor. Eng. and R.-D. Law, 300].

Vesting of fidei commissary's interest.

Then, again, the interest of the *cestui que trust* vests on the creation of the trust; the fidei commissary's interest does not vest until after the fulfilling of the condition of the *fidei commissum*—usually the death of the fiduciary. The prospective interest of the fidei commissary before the condition of the *fidei commissum* has been fulfilled is vaguely called by Voet *spes fidei commissi.* If the fidei commissary dies before the condition of the *fidei commissum* has been fulfilled, *e.g.*, if he predeceases the fiduciary, the fidei commissary's heirs take nothing, no interest having vested in the fidei commissary. The fiduciary thus becomes absolute owner of the property. The fidei commissary is thus in a worse position than the person to whom property is bequeathed subject to the life interest of another. Such a remainderman, if he predeceases the holder of the life interest, transmits his rights to his heirs [*Ibid.;* Br. Op. Grot. 223]. The fact that a prior interest is in the nature of a *fidei commissum*, however, is not conclusive proof that the testator intended to postpone the vesting until the termination of such prior interest. A *fidei commissum* may be so purely in the nature of what the English Law terms a trust as not to interfere with the vesting of a fidei commissary legatee's interest even before the arrival of the time for the payment of the legacy. An instance in point is mentioned by Voet [7. 1. 12] where a testator bequeathed a sum of money to his foster child, and directed the money to

Interest of fidei commissary may vest even before fulfilment of condition.

be transferred to another person as fiduciary who was to pay interest to the child until he reached his twenty-fifth year, when the capital was to be paid to him. It was here held that upon the death of the child before reaching that age he transmitted his fidei commissary right to his heir. The obvious ground on which this decision rested was that the expressions used by the testator pointed merely to the deferred enjoyment of the capital sum, and were not inserted for the purpose of deferring the interest [Mor. Eng. and R.-D. Law, 301].

The operation of the rule as to the non-vesting of an apparent *fidei commissum* may also be prevented by expressions in the will, from which it is to be inferred that it was the intention of the testator that the legacy should vest at once, and thus create a usufruct rather than a *fidei commissum*. Where a testator bequeaths a thing to A subject to a *fidei commissum* upon his death in favour of B, the legacy is deemed to be conditional upon B's surviving A, unless it is clear from the other part of the will that the testator, although using the term *fidei commissum*, employed it in an imperfect sense, and intended only to interpose a bare usufruct between the period of his death and that of A. If it were a true *fidei commissum*, A's heirs would, failing remaindermen at the time of his death, be entitled to the full benefit of the thing bequeathed [Mor. Eng. and R.-D. Law, 302].

Benefit derived by fiduciary by failure of *fidei commissum*.

An important difference between trusts and *fidei commissa* consists in the benefit which the fiduciary derives from the failure of the *fidei commissum*. In English Law, where property is given in trust, the rule is that the trustee is excluded from taking beneficially in case of failure of the whole or part of the purpose to which the trust is directed; while, if a *fidei commissum* fails, the fiduciary reaps the benefit. The latter becomes absolute owner of the property

[Voet 36. 1. 26]. As Sir Henry de Villiers says [Van Dyk's Case, 7 S. C. 196], "it is a rule of law in the absence of clear provisions to the contrary, that where a fidei commissary dies before the fiduciary, the latter takes the inheritance [Mor. Eng. and R.-D. Law, 303].

Wrongful disposal of property by trustee or fiduciary.

In English Law, if a trustee wrongfully disposes of property entrusted to him, the *cestui que trust* is entitled to follow it into the hands of any person, except a purchaser for value without notice. In Dutch Law the fidei commissary is entitled to follow immovable property into the hands of any one, but the right to follow movables is limited [Voet 36. 1. 64]. As regards immovables, although in theory they can be followed into any hands, the courts of South Africa have repeatedly expressed their disinclination to interfere with a *bonâ fide* purchaser without notice who had obtained registered transfer [*Ibid.*].

Tacit hypothec of fidei commissary.

The fidei commissary has also the security of a tacit hypothec over all the property left by the testator to the fiduciary. This hypothec may be enforced by a hypothecary action. This hypothec has been abolished in South Africa against *bonâ fide* purchasers for value [*Ibid.*].

SECTION III.

Legacies.

Definition and different kinds of legacies.

A LEGACY is a certain gift left in imperative terms by a deceased to be paid by his heir. Formerly legacies were of four kinds, distinct not merely in verbal forms, but also in nature and legal incidents. These were legacies *per vindicationem*, *per damnationem*, *sinendi modo*, and *per præceptionem*. These distinctions were abolished by Justinian, and now the description and nature of all legacies are one and the same [*Cens. For.* 1. 3. 8. 1].

Who may give and take legacies.

Those who may make a will have also the power of bequeathing by legacy, and all persons capable of taking by will may also take as legatees [V. d. L. 1. 9. 9; *Cens. For.* 1. 3. 8. 2, 3]. All who may leave by testament may bequeath a legacy to any one who has the right to take under their testaments. As to uncertain persons, a legacy could be validly left to those uncertain persons only whom it was possible to ascertain definitely in any way, either at once or on the happening of a future event. The State, Cities, Municipalities, and other public bodies may take legacies by means of those at their head. A legacy may be left to the head of a hospital or the president or governor of an association or community formed for the purpose of helping and supporting the poor. In these cases the legacy must be applied for the furtherance of the object of the institution of which the legatee is the head. Where a legacy is left in general terms to the poor, it may be claimed by associations having for their object the giving of alms to the poor. These have a claim preferential to that of hospitals, infirmaries, and other similar institutions [*Cens. For.* 1. 3. 8. 2, 3].

Legacy to the poor.

Who may be burdened with legacies.

All those who take any benefit under a will, whether as heirs or legatees, may be burthened with the duty of paying a legacy to others [V. d. L. 1. 9. 9].

When legacies are void.

Legacies are void (1) When it is impossible to collect in whose behalf they are made. If, however, the intention of the testator can be made clearly to appear, an error in the name or description of the legatee is not fatal. (2) When we cannot discover what thing the testator meant to leave. In this case also error in the name or description of the thing is of no consequence, provided the intention of the testator can be clearly discovered. Nor will an error in the motives assigned for the legacy affect it [V. d. L. 1. 9. 9; *Cens. For.* 1. 3. 8. 4]. Where a legacy is left as a definite thing or a species, it is not vitiated by a false or erroneous description; for instance, if the testator said—"I give and bequeath the ten coins which I have in my chest." Here, if he have only five in his chest, the legacy will be operative to that extent, but the remaining five cannot be demanded [*Cens. For.* 1. 3. 8. 4].

Error in description.

Legatee dying before testator.

The legatee dying before the testator or before the condition, if any, of the legacy is fulfilled or the prescribed time has arrived also renders the legacy void [Grot. 2. 24. 29].

Revocation of legacy.

Legacies, moreover, become void when they are revoked by the testator subsequently to the bequest either expressly or tacity—expressly, by the same or a later will, or if the same thing that has been bequeathed to one person is bequeathed to another, reference being made to the previous bequest; tacitly, by a serious enmity, or if the testator in his lifetime gives away the property bequeathed, or sells it without pressing necessity, but not if he puts it in pawn, unless intention to the contrary can be gathered [Grot. 2. 24. 26–28].

Subject of legacy.

A testator may charge his heir with the giving of any particular thing, or doing any particular act, and on non-performance of the condition may charge him with

a legacy to a third person, provided this condition be not contrary to law, or *contra bonos mores*. Legacies, however, given for the purpose of scandalising any one are not good; nor those made through pure caprice, or palpably tending to reward vice, nor made with the object to entice others to grant legacies to us, nor legacies which are obtained from the testator by deceit and misrepresentation, nor those which are made to depend entirely on the will of the heir [V. d. L. 1. 9. 9].

Legacies given to scandalise one.

There is nothing *in commercio* which may not be the subject of a legacy. Things future and which are as yet only in expectancy, individual things (*res singulares*) as well corporeal as incorporeal may be the subjects of legacies, even though the same be mentioned by a wrong name or otherwise incorrectly described, as long only as it is clear what is meant [Grot. 2. 22. 8 *et seq.; Cens. For.* 1. 3. 8. 7].

Subjects of legacies.

Incorporeal things, such as the usufruct of anything or a right of way, may be the subject of a legacy. Under these are also included acts; *e.g.*, if I direct my heir to build a house for A B or to release him from a certain charge [Grot. 2. 22. 17, 18].

Incorporeal things.

The usufruct of all one's property may be bequeathed. In this case, of course, the bequest would apply to those things only over which the testator had power of disposition [*Cens. For.* 1. 3. 8. 7].

Usufruct may be bequeathed.

In the case of a legacy left by way of dowry or on account of marriage, it is to be looked upon as a continual legacy, and if the legatee die before having contracted a matrimonial alliance, the legacy comes to an end, and accrues to the inheritance, and does not pass to the heirs of the legatee. It would be otherwise in the case of a daughter to whom her father has made a bequest of dowry. Here, a tacit intention in consequence of affection to children is inferred, and the legacy is considered as unconditional, and as transmissible to the heirs of the legatee. A legacy is also to

Legacy by way of dowry or on account of marriage.

Certain legacies to be deemed to be unconditional.

be taken as unconditional and transmissible to the heirs of the legatee where from the words qualifying the bequest it could be inferred that the testator had in view the mode in which it was to be carried out rather than a condition; as, for instance, if a provision referring to the period when the legatee attains a certain age, is married, is to receive dowry, or contract nuptials be inserted subsequent to a preceding unconditional disposition, or when mention of marriage is made in that part of the testament which has to do with the carrying out of the bequest and not with the making of it. In these cases the provision is considered as having been added not for the purpose of creating a condition, but only for the sake of deferring the payment of the legacy [*Cens. For.* 1. 3. 8. 10].

Where a parent or a person in *loco parentis*, gives a legacy as a portion, and afterwards upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the same child, a court of equity will presume the testator meant to satisfy the one by the other [*Trimmer v. Bayne*, 7 Ves. 508; 2 C. R. C. 27].

When an unconditional legacy becomes due.

An unconditional legacy becomes due forthwith on the death of the testator and the entry on the inheritance, and unless it be paid, its produce and interest may be recovered from the date of demand [*Cens. For.* 1. 3. 8. 38] except in the case of a minor. Here, there is no necessity for a demand, but interest is to be paid from the day on which the inheritance was entered upon [*Cens. For.* 1. 3. 8. 39].

A legatee or devisee who accepts the bequest or devise is bound by the conditions in the will or codicil regarding it [Vand. D. C. 9].

Duty of heir to make inventory and give security.

In the case of legacies and *fidei commissa* which are to take effect after a certain period, the duty is imposed on the heir of making an inventory and of giving security; and in the case of a bequest of a usufruct this duty cannot be avoided even though the

heir has been released therefrom by the testator in express terms [*Cens. For.* 1. 3. 8. 40].

From what property legacies are payable.

In England, legacies are payable primarily out of personal estate; and where, by implication, real estate is also charged with the payment of the legacies, the presumption is that the real estate is intended to be charged in aid only of, and not so as to exonerate, the personalty [*Elliott v. Dearsley*, 16. Ch. D. 322; 2. C. R. C. 234].

Property of heir may be left by legacy.

The testator may leave by legacy, not only his own goods, but also those of his heirs or third persons. In the latter case, the heir who is burthened with the legacy is bound to purchase the thing so left from the owner, and to give it over to the legatee, or at least, the value, if the owner be not disposed to part with it. In case the thing so left is already the full and absolute property of the legatee, the legacy is void, unless the legatee has obtained it by purchase or the like, in which case the heir is bound to reimburse him the price which he has paid. Legacies of things *non in commercio*, and which cannot be sold or alienated, are void [V. d. L. 1. 9. 9].

Bequest of property belonging to legatee.

Things *non in commercio.*

Right of choice.

Where a right of choice is given to a legatee there is nothing to prevent him from choosing the best article, and where it is given to the heir he may release himself by giving the worst. But, to whom, in a case of doubt, does the right of choice belong, the heir or the legatee? Van Leeuwen thus answers this question—"When a general legacy has been bequeathed, and its class is defined, it is the legatee who has the right of choice; but if a general legacy have been bequeathed in such a manner that it is not definite, or has not been clearly marked out by the testator, the right of choice belongs to the heir" [*Cens. For.* 1. 3. 8. 12]. A choice once made by the legatee cannot be altered, and if the choice be left to several persons, and they cannot agree, the matter must be decided by lot [Grot. 2. 22. 29]. If a thing is bequeathed under a generic name without any mention of a choice, as a horse, a house, or a ship, it is held that

Thing bequeathed under a generic name.

if anything answering to the bequest actually exists in the testator's estate, the legatee is to have his choice, but if nothing of the kind exists in the estate, or if it is something consisting in measure or weight without any further explanation, *e.g.*, a sack of corn, the heir may procure the same whencesoever he pleases; but in any circumstances he cannot satisfy the bequest by giving the worst, nor may the legatee choose the best unless only two things of the kind are found in the estate [Grot. 2. 22. 30].

Ambiguity in bequest.

If through some ambiguity in the wording it cannot be decided which of two things was meant, the heir may give the least [Grot. 2. 22. 12].

Duty of heir where property bequeathed belongs to himself or third persons.

Where a person bequeaths property belonging to his heir, the latter is bound to fulfil the wishes of the testator, whether the testator knew that the property belonged to the heir or not [Grot. 2. 22. 25]. If the property bequeathed be that of a third person, it is the duty of the heir either to buy it from its owner, and hand it over to the legatee, or, if the owner be unwilling to sell, then to pay its value to the legatee, provided the testator knew that the property he bequeathed belonged to somebody else. The legatee has to prove this. Where, however, the legatee is united to the testator by ties of relationship or affinity, the thing bequeathed must be redeemed by the heir and handed to the legatee or its value paid to him, whether the testator knew or not that it belonged to a third person [*Cens. For.* 1. 3 8. 24; Grot. 2. 22. 38].

Bequest of release from debt to debtor.

A man may bequeath to his debtor a release from his debt [*Cens. For.* 1. 3. 8. 23]. A bequest by a debtor to his creditor of the debt he owes him is void, unless by the bequest some advantage as to time, place, manner, or some other particular which did not attach to the original debt is offered to the creditor [Grot. 2. 22. 37].

Bequest to creditor.

Where a sum of money is bequeathed to a person on the ground that he is a creditor of the testator as the amount

of the debt, and after the death of the testator it is found that no debt was really due, still the legacy holds good, and where a definite sum of money is bequeathed to a creditor without reference to the debt due to him, he may recover both the debt and the legacy [*Cens. For*. 1. 3. 8. 23]. In Dutch Law the question whether a legacy is in satisfaction of a debt is entirely a question of the intention of the testator, and in deciding that question the court is not bound by artificial rules [Mor. Eng. and R.-D. Law, 289].

Bequest of property held by testator in common with another.

Where a testator bequeaths a thing which he owns in common with another, only the testator's share or interest in it is to be considered to pass to the legatee [*Cens. For*. 1. 3. 8. 25].

Bequest of property belonging to legatee.

The bequest to any one of property belonging to himself is, as already observed, void. If he should afterwards alienate it, he would nevertheless not be entitled to either the thing itself or its value [Grot. 2. 22. 36].

Legacy made in error.

A legacy made in error is also void, unless there are clear indications showing that even if the testator had known that the thing belonged to another, he would still have made the same disposition with respect to it in his will [Grot. 2. 22. 40]. Where the testator knew that the property bequeathed belonged to a third person, and the legatee after the execution of the will acquired the property for valuable consideration [*titulo oneroso*], he might claim its value from the heir, unless there were manifest indications of an intention on the part of the legatee to renounce the legacy. But, where he acquired the property without valuable consideration [*ex causa lucrativa*], he is not entitled to claim the thing or its value [Grot. 2. 22. 41].

Bequest of property of third persons with knowledge of such ownership.

Things *extra commercium.*

Of things which cannot become the property of the legatee the value cannot be claimed. A bequest of things *extra commercium*, as churches, &c., is altogether void [Grot. 2. 22. 42].

Legacy burdened with some disadvantage.

A legacy burdened with some disadvantage must either be accepted with the disadvantage or both must be renounced [Grot. 2. 23. 43].

Thing left to two or more persons.

Where one thing is left to two or more persons, and one is unwilling or unable to share in the legacy, the question arises whether the whole of it goes to the co-legatee or part to him and part to the instituted heir. This depends upon the probable intention of the deceased, regard being had to the words used, the value of the thing, and the circumstances of the deceased and the legatee [Grot. 2. 23. 5].

A legacy may be for a consideration or subject to a consideration.

A legacy may be bequeathed for a consideration or for a particular object or subject to a condition. A legacy purporting to be made for a consideration is operative, although the consideration is found to have been in reality non-existent. But if the consideration take the form of an object, and be made to refer to the future, or have been expressed as a condition, the rule of law is different [*Cens. For.* 3. 8. 27].

Where reason for or condition of a legacy fails.

Where a reason is assigned for a legacy, the legacy is valid, even if the reason be not true ; but in the case of a condition, if it fails, the legacy fails also, unless the fulfilment of the condition depended on the heir or the person in whose favour or for whose benefit the condition was imposed, or unless the condition were forbidden by law. If no time is mentioned for the fulfilment of the condition, the legatee may fulfil it at any time, and thus acquire the legacy ; but if he does not do so in his lifetime, his right does not pass to his heir [Grot. 2. 23. 11]. During the period during which the condition is in suspense, the legacy is in abeyance. An impossible condition does not invalidate the legacy while, if it is possible, it delays the vesting of the legacy until it is fulfilled. Meanwhile, the right itself is in suspense, so that, if the legatee die before the condition has been fulfilled, he can transmit no right to his

heirs [*Cens. For.* 1. 3. 8. 29]. If the condition consists in abstaining from anything, the legatee may claim the legacy immediately upon giving security that he will abstain. On the other hand, the legatee may demand security from the heir on account of a legacy, the condition of which is not yet fulfilled or the time for which has not yet arrived [Grot. 2. 23. 10]. If the legacy be an unconditional one, the period of vesting is that of the death of the testator. If the condition has reference to a future date which is certain to arrive, the effect is the same as if the testator had made the institution unconditionally. If the date be an uncertain one, the result is that the legacy does not become due before the date has arrived, and it does not in the meanwhile pass to the heirs of the legatee [*Cens. For.* 1. 3. 8. 30].

Condition to abstain from anything.

Where legacy is unconditional.

Where a legacy is left for a certain purpose or object, as if I say—"I leave A B Rs. 1,000 to have a tomb built for me"—the legacy may be claimed at once under security to do what the will directs [Grot. 2. 23. 11]; and where I bequeath a legacy for an object, as for instance, where I say—"I bequeath Rs. 1,000 in order that a building may be erected"—the legacy is valid, although the object becomes impossible. If the object becomes impossible, the legacy may be claimed at once, but security must be given [*Cens. For.* 1. 3. 8. 28].

Legacy left for a certain purpose or object.

Where a legacy is made payable upon an uncertain day, as upon the death of my eldest son, and the legatee dies first, his heir has no claim [Grot. 2. 23. 13]. A legacy left by way of a penalty is valid, as if I say—"If my heir go and reside out of Holland, I desire that he give a hundred pounds to the poor" [Grot. 2. 23. 12].

Legacy payable on an uncertain day.

Legacy left by way of a penalty.

Where a testator leaves the usufruct of his property to his wife, and calls his nearest relations to the inheritance after her death, the question arises as to the effect of any of the relations dying before the

Legatee dying before usufructuary.

termination of the usufruct. Does the share of those so dying pass to their heirs or can the survivors claim it by the *jus accrescendi?* In a case like this, where a bequest is made subject to a mere usufruct, the property in the thing bequeathed passes to the legatees on the death of the testator, and those of them who may be alive at the termination of the usufruct take their shares as a matter of course, and the shares of those who die meanwhile go to their heirs [*Cens. For.* 1. 3. 8. 31]. The consequence would appear to be the same where powers of alienation and consumption are granted in addition to the usufruct, and the provision in the will is that the legatees are to take what remains behind after the death of the survivor. Here, it must be noted that it is not open to the usufructuary to alienate anything with a view to defraud the heir. Only alienations in good faith hold good [*Cens. For.* 1. 3. 8. 33]. So too where, for instance, a testator bequeaths a certain sum of money to his granddaughter to be paid to her by the heir after she has attained the age of majority, or has celebrated her nuptials. The legacy here is an unconditional one, and it is only the payment of it and the right to demand it that have been postponed until majority or marriage; and therefore if the granddaughter die before the date of payment has arrived, the legacy passes to her heir [*Cens. For.* 1. 3. 8. 34]. In like manner where a child is to be given by the heir of the testator a certain sum of money on its reaching a certain age, and is to be paid interest until then, and the child dies before reaching that age, the bequest passes to its heirs [*Cens. For.* 1. 3. 8. 35]. In these cases a great deal depends upon the intention of the testator—whether he intended that the legacy was not to be given before a certain date or that the legacy was not to be paid, unless the legatee reached a certain age or survived a certain date [*Cens. For.* 1. 3. 8. 36].

Where power of alienation is granted to usufructuary.

Legacy payable on marriage, &c.

Legacy to be paid on reaching certain age.

The *jus accrescendi* has place among co-legatees of the same thing bequeathed by the same testator. It does not obtain among those to whom different things have been bequeathed, although in the same document and in the same paragraph, nor amongst those to whom the same thing has been left by different testators, nor is it allowed in the case of those to whom definite portions of the same thing have been bequeathed separately. Where the testator has forbidden accrual, or it is clear that he did not intend it, no accrual takes place, and the share of the legatee who fails remains in the inheritance, that is, as a part of the estate of the testator. Where the same thing is left in one and the same sentence to two or more persons, as for instance, if it be said—"I give and bequeath to A and B a farm in equal shares," here the expression "in equal shares" is not to be taken as inducing a separate gift. The separation, so to say, is only in the mind of the testator, and accrual takes place [*Cens. For.* 1. 3. 8. 37].

Jus accrescendi among legatees.

There are legacies to be paid yearly, monthly, or weekly, which have this peculiarity, that a legacy of this nature, as a yearly one, for example, is due from the first day of the year, and therefore if the legatee die within this time, it goes to his heirs. From the moment of the testator's death the legatee acquires a vested right in the legacy, in so far as it is not subject to any condition, in which case it only vests from the day the condition is fulfilled. The addition of a certain limited time has this consequence, that although the right to the legacy is vested by the death of the testator, the right to demand the legacy does not arise until the time arrives. When it is uncertain whether the time mentioned may ever arrive, or when it may come, it is held as a condition precedent except in cases in which this limitation of time is not annexed to the legacy itself, but only to the time of payment; in which last case, if the legatee

Legacies payable yearly, monthly, or weekly.

dies after the testator, but before the legacy itself is payable, the right nevertheless is vested and passes to his heirs [V. d. L. 1. 9. 9].

Legacy payable until the occurrence of a certain event.

Where a legacy is to be paid yearly until the occurrence of a certain event, it is to be considered that there are as many legacies as there are years during which the legacy is to be paid, and so, in such a case, in the event of the death of the legatee, his heirs cannot claim what was to become due in subsequent years, but they may claim the legacy for the year in which the death takes place [*Cens. For.* 1. 3. 8. 6].

Legacy payable by instalments.

If a legacy is made payable by instalments, for instance, in three yearly instalments, a third of the legacy must be paid at the end of each year, and should the legatee die within the three years, the legacy passes to the heir. But the bequest of an annuity as a hundred guilders yearly is considered as vesting on the first day of the year, and if the legatee dies within the year his right to the payment of that year passes to his heir [Grot. 2. 23. 14].

Improvements to property subject of legacy.

Its loss or destruction.

Improvements to the property made subsequently to the bequest go to the legatee, and if the property be damaged or even destroyed without complicity on the part of the heir or without any delay on his part in making delivery, the loss falls on the legatee [Grot. 2. 22. 13]. The heir would in such a case not be entitled even to what was merely an accessory to what has perished, as for instance, the bridle in the bequest of a horse and bridle.

Legacy of property mortgaged.

If the property bequeathed is so burdened that the ownership may become lost, as is the case with mortgaged property, the heir must release the property, unless otherwise directed, but in case of encumbrances from which no such result can follow, such as servitudes and rights of reversion, the legatee must be satisfied with what is bequeathed to him, good or bad, as it is [Grot. 2. 22. 16].

In the interpretation of bequests we must not depart from the proper signification of the words of the will, unless there are good reasons to believe that the testator had understood them in another sense; for example, when the disposition in his will would otherwise amount to a contradiction, or could not be supported, the words at all times must be so interpreted that the disposition in the will may stand. In cases of doubt with regard to the sum, the least must be taken as meant [V. d. L. 1. 9. 9]. Interpretation of bequests.

A general legacy of goods out of a certain class or description comprehends also such things as are not entirely of this nature, but wherein some other matter by way of addition is contained; for example, under a legacy of the tortoise-shell boxes possessed by the testator are comprehended also those of tortoise-shell with gold or silver setting or mounting [V. d. L. 1. 9. 9]. Personal legacy of goods.

When a testator follows a general bequest of any kind of thing with the enumeration of the special sorts, the legacy is not confined to the special enumeration, unless another object of this limitation clearly appears. Under general legacies are not comprehended those things which, although comprised under the principal head, have been already specifically bequeathed to another. General legacies. When the testator has made two contrary dispositions by his will, and in each of these seems equally to persevere, or when no distinction can be made in respect to which he perseveres in and in which he has changed his intention, the one disposition annuls the other, and neither can take effect. Two contrary dispositions in will. A bequest of a parcel of land with all its appurtenances, or all that belongs to it, carries with it the implements of husbandry used in cultivating the land [V. d. L. 1. 9. 9]. Bequest of land with appurtenances.

The bequest of a farm or landed estate, thoroughly furnished, comprehends not only all that is necessary to the cultivation of the land, but also the household Bequest of farm thoroughly furnished.

furniture and all that is necessary to render the house habitable. Under legacies of things at or to be found in a certain place are comprehended all things which, from their nature and use, are usually kept and intended to remain there, and not what is accidentally found there [V. d. L. 1. 9. 9].

Things to be found in a certain place.

Bequest of farm with implements upon it.

Where a farm is bequeathed with the equipments that are upon it, the bequest includes every implement belonging to the owner with which the farm has been equipped and everything which he kept on it for the purpose of rendering its equipment more complete, and therefore comprehends household furniture, glassware, gold and silver, and also the wine and oil which were on the property ; also food and utensils and sustenance requisite for feeding cattle and labourers, and everything else subservient to the use of the farm. Things not so subservient, but kept on the farm for mere protection or safety or for any other object, do not fall within the bequest : for example, corn for sale, fruits stored upon the farm to be devoted to some other object than the use of the farm, wine stored up in the cellars which the owner destined for use elsewhere, and household or other ornaments, the object of whose presence was not the adornment of the farm [*Cens. For*. 1. 3. 8. 13]. Farming implements are all the implements necessary for farming purposes [Grot. 2. 22. 23].

"Live and dead stock."

Primâ facie, the expression "live and dead stock" would not include the bungalow furniture of an estate intended for the use of the superintendent. Such construction may be warranted by particular usage [*Saibo v. Kerr*, Wendt, 278 ; 5. S. C. C. 134].

Bequest of a flock of animals.

Where a flock of animals is bequeathed, the increase or decrease, the profit or loss, goes to the legatee ; and even if only one animal survives, the legacy holds good [Grot. 2. 22. 20].

Imboel.

Imboel is all the movable property found in a house [Grot. 2. 22. 21]. Household furniture is everything

properly belonging to the requirements of a household, as benches, chairs, &c. [Grot. 2. 22. 22].

Under a bequest of "household stuff" come the domestic implements of a householder and whatever has to do with the everyday requirements of household affairs. Under the appellation of gold and silver are included in common parlance all gold and silver, whether wrought or unwrought, of whatever description they may be. If, however, the gold be left to one, and the "household stuff" to another, then that gold which is included in the "household stuff" is separated from the other gold. Of course, a distinction between gold and silver and coined money is now invariably observed [*Cens. For.* 1. 3. 8. 14, 15]. Whether a golden cup or any other article made of gold or silver comes under the denomination of household stuff depends on the ordinary use made of it, and the general purposes which it serves [*Cens. For.* 1. 3. 8. 16].

Bequest of "household stuff."

"Gold and silver."

Wearing apparel is all the clothes including dresses, cloaks, gowns, &c. [Grot. 2. 22. 24], and jewellery includes all gold, silver, precious stones, and such like, with which the person is not clothed but ornamented [Grot. 2. 22. 25].

Wearing apparel.

Under the term "articles of toilette" are included what are habitually worn as articles of personal adornment, and under the term "ornaments" whatever one makes use of to increase his or her adornment. In a bequest of clothes or garments gold or silver is not included, unless it be woven into or fastened to the garment; and where the bequest is that of the right of having garments to clothe oneself with procured for him, the kind of clothes intended must be gathered from the words of the testator, and if that cannot be done, then garments suitable to the station in life and condition of the person of the legatee must be taken as intended [*Cens. For.* 1. 2. 8. 17, 18].

"Articles of toilette."

"Maintenance."

"Maintenance" includes food, raiment, a place to live in, medicines and drugs, and lasts a man's lifetime. These are to be provided on a scale regulated by the resources of the property, and are to be estimated more or less liberally according to the dignity and quality of the person of the legatee, and the circumstances generally of the testator and legatee. Under the denomination, "food or victuals," those things only which relate to food are included, and not to dwelling places or clothing [*Cens. For.* 1. 3. 8. 19, 20; Grot. 2. 22. 26].

When a bequest of maintenance is made to one whom the testator by law or by ties of blood was bound to maintain, the expenses too of education and training suitable to the position and dignity of the estate are included. In other cases they are not, unless express mention has been made of such expenses [*Cens. For.* 1. 2. 8. 21].

When maintenance to one under age ceases.

Maintenance bequeathed to one under age ceases in the absence of an expressed intention of the testator to the contrary, on his attaining majority, unless the legatee is unable to earn his bread even after reaching majority by reason of his being of weak intellect or *non compos mentis*, in which case maintenance will be due permanently [*Cens. For.* 1. 3. 8. 22].

Legacy of plate.

A legacy of plate comprehends all the table service, as dishes, plates, spoons, forks, knives, bowls, salt cellars, candlesticks, chafing dishes, &c., but no other plate, such as silver chandelier branches, images, &c., pass under such a bequest. Under the head of clothes is comprised all articles which are used for this purpose. both for head and feet, but not that which pertains only to ornament. In a bequest of "household furniture" is included all that is necessary for the usual furnishing of a house, but not plate or costly articles serving merely for ornament [V. d. L. 1. 9. 9].

A legacy lapses if the legatee acquire the subject of the legacy by way of clear gain, or if the actual thing bequeathed perish without the agency or fault of the heir himself, or if the legatee die before the date of the vesting of the legacy; or if the testator's position from being one of testacy become again one of intestacy. The revocation of a legacy by the testator could be done in the olden time with even less formalities than those necessary for the execution of a will or codicil. A revocation also took place when the thing bequeathed was alienated by the testator with the intention of adeeming it. This intention had to be clearly shown by the heir. An alienation in consequence of a necessity of some kind did not amount to a revocation of the legacy, and, on the other hand, an alienation of the thing bequeathed by the testator voluntarily and without being forced to do so by any necessity might be taken into account in considering the question of intent. A testator might also transfer a bequest from one legatee to another. Such a transfer, of course, effected a revocation of the original bequest, so much so that, even if the transfer was to one incapable of taking the thing transferred, the original legacy did not revive [*Cens. For.* 1. 3. 8. 41].

When a legacy lapsed.

Formalities of revocation.

Alienation of thing bequeathed.

The legatee has three distinct actions for his legacy—(1) A personal action under the will against the heir or such other person as is charged with the payment of the legacy, or against the executor, for the delivery of the thing, with such increase or decrease as it may have suffered, provided the latter has not been caused by the fault of the heir [V. d. K. 1. 9. 9]. The legatee may not take possession of the thing bequeathed on his own authority. He must demand it from the heir, unless the right to take possession is allowed him by the will [Grot. 2. 23. 18]. (2) An action *in rem* to recover the thing itself, against any possessor whomsoever [V. d. L. 1. 9. 9], if the thing bequeathed belonged

Actions open to legatee.

Legatee must demand legacy from heir.

to the testator [Grot. 2. 23. 18]. (3) Any hypothecary action on the ground of the tacit or implied mortgage which the law gives to legatees in this respect in all the property which comes to the heir from the testator [V. d. L. 1. 9. 9]. The legatee has a right of tacit hypothec on the estate of the deceased after the debts have been paid, but the right of mortgage may be disallowed by the will [Grot. 2. 23. 19].

Action of legatee against executor.

A legatee may maintain an action for the legacy against the executor of the will under which the legacy is claimed without alleging or proving the latter's assent to the bequest, nor need he allege or prove sufficiency of assets in the hands of the executor to meet the bequest. Whether the assets are sufficient or not, is a fact peculiarly within the knowledge of the executor, and he may plead insufficiency of assets in answer to the legatee's claim [*Fernando v. Soysa*, 2 N. L. R. 40].

Legatee's title is subject to assent of executor

In Ceylon, as all the property of the testator passes to the executor, the title of the legatee or any other devisee is subject to the executor's power of assent, and until that assent has been given, the executor has a right to the possession of the property, subject to his having to account to the legatee or devisee for mesne profits in the event of the devise taking effect. But where a devisee had been allowed to take and remain in possession of the land devised, and had disposed of the produce of the land on contract to a third party pending the administration of the estate by the executor, it was held that the devisee was entitled to claim the price from the purchaser as against the executor, subject to the executor's power, in the event of resort to the property being necessary for the payment of debts, to call upon the devisee to account for the mesne profits since the testator's death [*Menika v. Anderson*, 1 C. L. R. 101].

He cannot assume possession without such assent.

A legatee cannot assume possession of land devised to him until the executor has assented

to the legacy. Until such assent the executor may maintain an action to recover the subject-matter of the legacy from a third party [*Ondaatjie v. Juanis*, 8 S. C. C. 192]. In the case of *Mohamadu Cassim v. Cassim Markar* [2 C. L. R. 72; 1 S. C. R. 180] the following opinions were expressed :—Burnside, C.J.—In Ceylon, if a person dies intestate, all his immovable property passes to his administrator; but if he leaves a will, only such property as is not specifically devised passes to his executor. Land specifically devised vests in the devisee immediately on the testator's death by virtue of the devise contained in the will; but the devisee's title is imperfect, the land remaining liable for the testator's debts in due course of administration. The executor's right to resort to property so devised for payment of debts is an interest in land of which he can divest himself only by deed duly executed. Lawrie, J. —The title in land specifically devised passes, by virtue of the devise, to the devisee; but that title may be defeated by the creditors of the testator or by the executor in the course of realising the estate for payment of debts. Until the debts are paid, the devisee may be required either to relinquish the land or contribute to the extent of its value towards payment of debts. The devisee's title may be perfected by securing the executor's assent to the devise. Such assent need not be evidenced by notarial deed, and need not even be express, but may be implied. Withers, J.—No assent of the executor or administrator is necessary to pass title to the heirs appointed by the will or the heirs at law, for they have this title on the death of the testator or intestate, subject to the suspension of enjoyment during administration and subject to the limited estate or title of the executor or administrator. The executor's or administrator's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs.

Does legatee get title without formal conveyance by executor?

As to whether the heirs can pass title independently of the executor or administrator, see further under heading "Executor" [p. 295 *ante*].

Falcidian portion.

With the Romans, it was lawful for the heir to deduct his *Falcidian portion*, that is, a fourth part of the property when more than three-fourths was willed away from him in legacies; but by the Roman-Dutch Law this deduction was not permitted, except when the heir entered upon the inheritance under the benefit of inventory [V. d. L. 1. 9. 9].

Debts to be deducted from legacies.

When the instituted heir is given a certain share of the estate, a proportionate share of the debts of the deceased, including those due to the heir, must be deducted from each legacy so as to enable the heir to have his full share [Grot. 2. 23. 20].

SECTION IV.

INTESTATE SUCCESSION.

North and South Holland Laws of Inheritance.

INHERITANCE *ab intestato*, which took place when the deceased had either made no will or his will for some of the reasons mentioned already became void, had been from old times in Holland of two kinds, that is to say, either according to the *Aasdomsch* or according to the *Schependomsch Recht.* The rule of the first was that the next of blood inherited the goods; of the second, that the goods reverted to the source from which they came. From these laws the States of Holland, in the year 1580, framed a law of inheritance *ab intestato* under the title of the *New Schependomsch* or *South Holland right of inheritance ab intestato;* but as those who inhabited the Northern districts were accustomed to the *Aasdomsch Recht*, and were not reconciled to the new law, a law was made in the year 1599 whereby the succession *ab intestato* was regulated for the towns of Haarlem, Leyden. Amsterdam, and other towns and places. This law was termed the *New Aasdomsch* or the North Holland and West Friesland Law of Inheritance [V. d. L. 1. 10. 1; Grot. 2. 28. 1 *et seq.*].

Chief heads of rules of inheritance.

The chief heads of these laws of inheritance *ab intestato* with their differences were as follow [V. d. L. 1. 10. 2]—(1) Children, grandchildren, and remoter descendants were preferent to all others in the estate of the parents. All the children took equally *per capita*, but the children of a deceased brother or sister took *per stirpes* or by representation.

(2) The children and remoter descendants failing, the inheritance of the deceased went to his father and mother, in case they were both alive.

(3) If only one of the parents was alive, whether father or mother [that is, in the case of what was termed "the separation of the bed"] then, by the Law of South Holland, all the goods of the deceased went to the brothers and sisters, whether of the whole or half-blood, in equal shares and their children and grandchildren *per stirpes*, provided the half-brothers and sisters and their descendants were related to the deceased on the side of the deceased parent; since, in South Holland, when the bed was thus separated, the surviving father or mother and all the collateral relatives which were of kin to the deceased through the surviving father or mother were excluded. But according to the North Holland Law, the surviving parent divided with the brothers and sisters of the deceased, whether of the full or half-blood, and their children and grandchildren by representation, the whole of the inheritance, that is to say, the surviving parent took one-half, and the brothers and sisters and their children the other half. In these were included half-brothers and sisters and their children who were related to the intestate by the side of the deceased parent. In case there was no full or half-brother or sister alive, then the surviving parent inherited the whole, although there might be children or grandchildren of the deceased brothers and sisters.

(4) Father and mother both failing, the property of the intestate went to his brothers and sisters whether of the whole or half-blood and their children and grandchildren by representation. The half-brothers and sisters divided but "with the half hand," as it was termed; that is, the inheritance was divided into two parts, the one-half the full brothers and sisters divided with the half-brothers and sisters of the father's side, and the other half they divided with those of the mother's side. But if there were only half-brothers and sisters of one side, the full brothers and sisters

took then, in the first place, one-half of the goods, and divided the other half with the half-brothers and sisters.

(5) When full brothers and sisters or their children or grandchildren failed, and there were half-brothers and sisters and their children or grandchildren on both sides alive, then one-half of the goods went to the half-brothers and sisters or their children and grandchildren *per stirpes* on the father's side; and the other half to the half-brothers and sisters on the mother's side, their children and grandchildren as before.

(6) In case all the half-brothers and sisters, their children and grandchildren, were related to the intestate only on one side, then according to the Law of South Holland they took only half of the goods, and the other half went to the next of kin of the other side. But in North Holland, these half-brothers and sisters, their children, and grandchildren who were related to the intestate only on one side took the whole of the goods, unless there was a grandfather or grandmother or higher ascendant yet alive related to the intestate on the other side; since then, such half-brothers and sisters, their children, and grandchildren, would only take one-half, and the next ascendant or ascendants *per capita* the other half.

(7) According to the South Holland Law of Intestacy, although those who succeeded to the inheritance were all equally near in degree to the intestate, yet they took *per stirpes* and not *per capita;* but according to the Law of North Holland they took in that case *per capita* and not *per stirpes.*

(8) All the persons above enumerated failing, accordingly to the Law of South Holland, all the goods of the intestate went to the next descendants of brothers and sisters' grandchildren *per capita.* After these, to the grandfathers and grandmothers of both

sides if both were alive; but if one of these was dead, either grandfather or grandmother, then his or her share went to the nearest relations on such deceased grandfather's or grandmother's side; viz., to the uncles and aunts of the intestate and their children of the first degree by representation, in such way that the goods being divided into two parts, one-half went to the father's and the other to the mother's side, the next of kin of the half-bed dividing only with the "half-hand." When there were no uncles or aunts, then their children of the first degree took *per stirpes*, and on failure of these the nearest collaterally *per capita*.

(9) But according to the Law of North Holland, when all the persons enumerated in articles 1 to 7 failed, the inheritance went first to the nearest in the ascending line *per capita*, although it should happen that on the one side both the grandfather and the grandmother, and on the other side only one of these parents should be alive. After these to the nearest descendants of brothers' or sisters' grandchildren *per capita*, whether of the full or half-blood. Afterwards to uncles and aunts and their children of the first degree by representation. Uncles and aunts failing, then to their children of the first degree, and also great-uncles and aunts with them *per capita*; and after all these to the next of kin also *per capita*, to the exclusion of all who were in a more remote degree [V. d. L. 1. 10. 2].

The "four quarters."

In the second degree of collateral relation were the two grandfathers and the grandmothers, that is to say, on the father's and mother's side, and hence arises the phrase of "the four quarters," meaning the relations on the sides of the paternal grandfather and grandmother and of the maternal grandfather and grandmother respectively [Grot. 2. 27. 10].

When relations were incompetent to succeed.

If any of the relations were incompetent or unwilling to succeed, their shares went to the others who were entitled to succeed either concurrently with them or

after them and who were related to the deceased on the same side, that is, on the father's or mother's side [Grot. 2. 29. 43].

Certain incidents of the law of inheritance.

With respect to the law of inheritance *ab intestato* the following peculiar distinctions were to be observed—

(1) Whoever criminally caused the death of the deceased, even though he was the next of kin, might not inherit [Grot. 2. 28. 42].

Personal property follow law of domicil and real property the *lex loci rei sitæ*.

(2) As regards personal or movable property, the succession by intestacy was regulated by the law of the place of the testator's decease [*Sterfhuis* or *Domus Mortuaria*] unless the place happened to be any other than his accustomed place of residence or domicil; but with respect to immovable property the law of the situation or *lex loci rei sitæ* applied [V. d. L. 1. 10. 3; Grot. 2. 26. 12].

Hotchpot.

(3) Children or grandchildren by representation becoming with their brothers and sisters heirs *ab intestato* to their deceased parents or grandfathers or grandmothers had, in order to be admitted to an equal division, to bring into *hotchpot* [*collatie*] all that they have already received from the deceased parents above the others either on marriage or to establish them in any trade or business [V. d. L. 1. 10. 3; Grot. 2. 11. 10]. This collation was intended for the benefit not only of the other children but also of the surviving parent [Grot. 2. 11. 10], and not only in favour of a mother but sometimes even of a stepmother [V. d. K. 223]. It took place both under the North Holland and the South Holland Law. If at the time of the donation the property had not been valued, those liable to collation might bring in the property or its true value, and if a particular value had been placed on it they might insist on collating such value and sharing according to law. Collation took place with respect to property settled on a first or any subsequent marriage [Grot. 2. 28. 14].

Donatio simplex not liable to collation.

A *donatio simplex* received by a child from a parent is not in general liable to collation, unless it is expressly made so, or it appears to have been given in lieu of dowry [Wendt 172; *Cooray v. Perera*, 5. S. C. C. 113, Voet 37. 6. 13]. When the materials disclose nothing with respect to the motive which induced the gift, the donation must be regarded as simplex [*Cooray v. Perera*, 5. S. C. C. 13].

Man and wife becoming heir to each other.

(4) Man and wife could not be heirs to each other *ab intestato*, except according to the Law of North Holland when no next of kin of the intestate were to be found.

Illegitimate children.

(5) Illegitimate children succeeded to the inheritance of their mother *ab intestato* as the mother made no bastard. But were they, in like manner, admissible to the inheritance *ab intestato* of their mother's relations? Van der Linden was inclined to the opinion of those who answered the question in the negative [V. d. L. 1. 10. 3]. But Grotius says that by blood relations in the matter of succession *ab intestato* were meant as well those born in as out of wedlock, excepting that natural children or their descendants succeeded *ab intestato* to property of deceased only so far as they were related to the deceased through being the illegitimate children of a female but not of a male; for, in reference to the mother illegitimate children were in the same position as legitimate children unless indeed they were sprung *ex prohibito concubitu*, in which case they and their descendants could not inherit *ab intestato* [Grot. 2. 27. 28]. Van der Keessel lays down broadly that natural or spurious children may succeed *ab intestato* not only to their mother but to their maternal cognates [V. d. K. 341–345]. Persons legitimated by subsequent marriage did not differ from those legitimate by birth. Those legitimated by act of the Sovereign however were considered legitimate in relation to the Crown as also to all persons who had

consented to the legitimation and to their children, but were not entitled to the inheritance of those who had not consented in the same way as the latter in their turn could not succeed to the inheritance of the former [Grot. 2. 32. 7].

(6) Bastards who left children born in lawful wedlock might be succeeded by these as heirs *ab intestato*, and on failure of children the goods went to the next of kin on the mother's side, so as to exclude the Crown [V. d. L. 1. 10. 3]. In the case of a child illegitimate by birth and not legitimated, one-half of his estate on his death went to the mother's side, if the mother was dead, and the other half to the Crown. If the mother was not dead, then the whole inheritance went to the Crown in the same way as it would have gone to the father's side, if the deceased had been born in lawful wedlock [Grot. 2. 31. 4].

Succession to bastards.

This was apparently the Law of Zealand. In North Holland all the property went to the relatives of the maternal line; and the same rule may be laid down as regards South Holland [V. d. K. 368].

Of children born *ex prohibitu concubitu* the whole inheritance went to the Crown [Grot. 2. 31. 6].

(7) When any one died intestate without next of kin or heirs the estate escheated to the Crown; but this failure must be complete, since, if any of kin could be found, even beyond the tenth degree, they took the goods. So also when the next of kin of one side failed, their part did not escheat, but went to the next of kin on the other side [V. d. L. 1. 10. 3]. The Crown was entitled not only when a person died without leaving any relations at all, but also on failure of relations on one side or the other, that is to say, when the inheritance was to go to two sides, one taking a part in exclusion of the other. In that case, for want of legitimate heirs, the shares of that side escheated to the Crown [Grot. 2. 30. 3], and for the benefit of the

When estate escheats to Crown.

Crown relations were also considered as failing who did not appear within a year and a day [Grot. 2. 30. 4].

As to the law of intestacy in certain particular towns in Holland see Grot. 2. 31. 5.

Widow or child of partner in trade receiving annuity from surviving partner.

It may here be mentioned that a widow or child of a deceased partner of a trader receiving by way of annuity a portion of the profits made by such trader in his business does not, by reason only of such receipt, become a partner of, or be subject to any liabilities incurred by, such trader [Ord. No. 21 of 1866, sect. 5].

Action open to true heir as against possessor of inheritance.

The true heir of a deceased person has an action to have his inheritance restored to him by the person who is in possession of it claiming to be heir or as mere possessor [Voet 5. 3. 1].

What he need prove.

He who sues for an inheritance *ab intestato* is not bound to prove that the deceased died intestate. It is sufficient for him to show that he is the nearest and therefore the legitimate heir. Upon this being done the right of action is proved, and it then devolves on the defendant to establish his exception that the legitimate heir was excluded by will [Voet 5. 3. 4].

The Matrimonial Rights and Inheritance Ordinance.

In Ceylon, Ordinance No. 15 of 1876 [amended by Ordinance No. 2 of 1889 and Ordinance No. 3 of 1890, and proclaimed on the 29th June, 1877] makes provision as to intestate succession. The Ordinance applies only to the estates of those persons who have died after the date of its proclamation, and were unmarried or, if married, had been married after that date [sect. 24].

Right of inheritance to property.

Right of inheritance *ab intestato* to the immovable property in Ceylon of a person deceased is governed and regulated by the Ordinance, wherever he may have or have had his actual or matrimonial domicil. Right of inheritance *ab intestato* of the movable property of a person deceased is governed and regulated by the law of the country in which he had his domicil at the time of his death. When a person has his domicil in any part of the Island, such domicil, so far as relates

Domicil of deceased.

to the inheritance to his movable property, is deemed to be in the maritime provinces. If, however, a person dies leaving movable property in Ceylon, in the absence of proof of his domicil elsewhere, the inheritance to such property is governed by the provisions of the Ordinance [sect. 25].

Ordinance not to apply to Kandyans, &c.

It is here to be noted that the Ordinance does not apply to Kandyans or Mohammedans, or to the Tamils of the Northern Province who are subject to the Tesavalamai, except to the extent that, as provided therein, a woman who marries, after its proclamation, a man of different race or nationality from her own is to be taken to be of the same race and nationality as her husband for all the purposes of the Ordinance, so long as the marriage subsists and until she marries again [sect. 2].

Nationality of married woman.

Right of surviving spouse.

Where a person dies intestate leaving a spouse surviving, such spouse inherits one-half of the property of the deceased [sect. 26].

Order of devolution.

Subject to this right of the surviving spouse, the right of inheritance is divided in the following order as respects (1) descendants, (2) ascendants, (3) collaterals [sect. 27].

Right of children and grand-children.

Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. The children take equally *per capita*, but the children or remoter issue of a deceased child take *per stirpes* or by representation [sect. 28].

When descendants fail.

The children and remoter descendants failing, the inheritance of the deceased goes to his father and mother in case they are both alive. If any one of the parents be alive, the surviving parent takes half, and the brothers and sisters of the deceased of the full-blood, and the issue of any deceased brother or sister of the full blood by representation, and the brothers and sisters of the half-blood who are related to the deceased by the side of the deceased parent, and the

issue of any such deceased brother or sister of the half-blood by representation take the other half. If there is no full or half-brother or sister alive at the death of the deceased, the surviving parent inherits the whole, although there may be children or other issue of deceased brothers or sisters [sect. 29]. The "half-brother or sister" mentioned in this last event must, we presume, be taken to mean half-brother or sister by the side of the deceased parent; so that, the existence of any half-brother or sister of the deceased by the side of the surviving parent does not affect the latter's right to the whole inheritance.

Where parents fail.

Father and mother both failing, the property of the intestate goes to his brothers and sisters, whether of the whole or half-blood, and their children and other issue by representation [sect. 30].

Division in case of half-brothers and sisters.

The division in the case of half-brothers and sisters is as follows—The inheritance is divided into two parts. The one-half the full brothers and sisters and the issue of such as are deceased by representation divide with the half-brothers and sisters of the father's side, and the issue of such as are deceased by representation. The other half they divide with those of the mother's side and the issue of such as are deceased by representation. If there are only half-brothers and sisters or such issue of one side, the full brothers and sisters and the issue of deceased full brothers and sisters by representation take then in the first place one-half of the property, and divide the other half with the half-brothers and sisters and their issue by representation [sect. 31].

When full brothers and their children fail.

When full brothers and sisters or their children or remoter issue fail, and there are half-brothers' and sisters' children or remoter issue on both sides alive, then one-half of the property goes to the half-brothers and sisters or their children and remoter issue by representation on the father's side, and the other half

to the half-brothers and sisters on the mother's side and their children and remoter issue by representation [sect. 32].

When there are half-brothers only on one side.

In case all the half-brothers and sisters, their children and remoter issue, are related to the intestate only on one side, they take the whole of the inheritance, unless there be a grandfather or grandmother or higher ascendant yet alive, related to the intestate on the other side, in which case such half-brothers and sisters, their children and remoter issue by representation, take one-half only, and the next ascendants *per capita* the other half [sect. 33].

When all who succeed are equally near in degree.

Except when otherwise provided, if all those who succeed to the inheritance are equally near in degree to the intestate, they take *per capita* and not *per stirpes* [sect. 34].

All above enumerated failing.

All the persons above enumerated failing, the inheritance goes first to the nearest in the ascending line *per capita*, although it should happen that on the one side both the grandfather and the grandmother, and on the other side only one of these parents should be alive. Afterwards to uncles and aunts *per stirpes*. Uncles and aunts failing, then to their children and also great-uncles and aunts with them *per capita* [sect. 35].

All above enumerated failing, surviving spouse takes.

All the persons above enumerated failing, the entire inheritance goes to the surviving spouse, if any, and if none, then to the next heirs of the intestate *per capita*.

Illegitimate children.

Illegitimate children inherit the property of their intestate mother, but not of their father or that of the relatives of their mother. Where an illegitimate person leaves no surviving spouse or descendants, his or her property goes to the heirs of the mother. so as to exclude the Crown [sect. 37].

On failure of heirs, Crown takes.

If any one dies intestate without heirs, his or her estate escheats to the Crown. If, however, any heirs can be found, even beyond the tenth degree, they take the inheritance [sect. 38].

Collation by children, &c.

Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into *hotchpot* or collation all that they have received from their deceased parents above the others, either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation [sect. 39].

Casus omissi to be governed by Law of North Holland.

In all questions relating to the distribution of the property of an intestate, if this Ordinance is silent, the rules of the Roman-Dutch Law as it prevailed in North Holland govern and are followed [sect. 40].

Which of the two Dutch Laws of Inheritance prevailed in Ceylon before Ordinance.

There seems to have been some doubt as to which of the two Laws of Holland as to intestate succession prevailed here anterior to the passing of the Ordinance. Thomson [Vol. 2, p. 250] was of opinion that it was the Political Ordinance of 1580 or the South Holland Law; but it was held in *Dona Clara v. Dona Maria* [Ram. 1820–1833, p. 33], in *Fernando v. Fernando* [Ram. 1863–1868, 279], and in C. R., Colombo, 76,626 [Vand. 172], in which Thomson's statement seems to have been carefully considered, that the law of succession in Ceylon depended upon a resolution of the local Government dated December 20, 1758, promulgating the Placard of 1599, which adopted the Aasdomsch Code or the North Holland Law of Inheritance. [See also Vand. Ap. II.]. This is the law in force in Demerara.

CHAPTER III.

SERVITUDES.

Right of servitude.

THE right of servitude according to Van der Linden is a sort of real right whereby an inheritance, whether it be a house or land, is bound or subject to the use or convenience of a neighbouring house or land. The servitude or use may, he says, be also of the thing to a person [V. d. L. 1. 11. 1]. Van Leeuwen defines it as a species of imperfect property and a right less extensive than usufruct. He says it is the right of prohibiting something or doing something to or in the house of another or upon his land for our own benefit and above our ordinary legal right [V. L. 2. 19. 1]. Grotius thus explains the nature of the right—Ownership is either full or qualified. Qualified ownership is that property in a thing to which there is something wanting which prevents the owner from doing with it whatever he pleases although not forbidden by the common law. Where there is qualified ownership, whatever is wanting to one belongs to another, who consequently has also a qualified ownership ; for instance, a person who has a right of footpath over land has no full ownership, for he may not sell the land or claim the fruits thereof, both of which are included in full ownership, while the person who has to allow the footpath has not the full ownership either, for he may not prohibit the other from coming on to his land, a right which is a part of ownership.

Van Leeuwen's definition.

Nature of right as explained by Grotius.

"Ownership" and "privilege."

For the sake of distinction the term "ownership" is confined to the rights of the person who has the larger share in the ownership he being the one who may sell and let the land, and the lesser share is called a privilege, such as the right of footpath for instance. In order to

ascertain which is the larger and which is the smaller share, more attention is frequently paid to value than to profits; and consequently that person is said to be the owner of quit-rent land who receives the quit-rent, and who has the right of confiscation by virtue of his upper ownership, and not the lessee who nevertheless draws greater profits from the land. It is the lesser share that comes under the term "qualified ownership." When it is known wherein that consists, it will be evident that whatever is not included in it belongs to the person who has the larger share, and who is consequently called the owner [Grot. 2. 33. 1].

Easement can be claimed only as accessory to a tenement.

An easement can be claimed only as accessory to and for the benefit of a tenement; and a vendor of land cannot annex as incident to the land a right in the nature of an easement, unconnected with the enjoyment or occupation of the land [*Ackroyd v. Smith*, 19 L. J. C. P. 315; 10 C. R. C. 1]. Where the dominant tenement is so altered as to change the nature of the easement, the easement is extinguished; but the easement is not extinguished, if the use is the same in substance though not in quality [*Luttrel's Case*, 4 Co. Rep. 86 *a*; 10 C. R. C. 294].

Alteration of dominant tenement.

No servitude to do something.

It is not in the nature of servitudes that a person should do something, but that he should allow something to be done or refrain from doing something [Voet 7. 1. 1]; and the granting of a servitude, being as it were something vexatious and contrary to natural liberty, receives a strict interpretation, and when there is any doubt, the interpretation ought to be in favour of the unfettered enjoyment of one's own property [Voet 8. 2. 2].

Servitude to be strictly interpreted.

Division of servitudes prædial or real and non-prædial or personal.

Servitudes are either *prædial* or *non-prædial* [Grot. 2. 34. 2]. They may also be respectively termed *real* and *personal* servitudes [V. d. L. 1. 11. 1]. Although under the generic title of servitude, both personal and real servitudes are comprised, yet the term is often applied to one species only, namely, real

servitudes, so when it is said that no one can let a servitude it is to be understood that the reference is not to all servitudes, but only to real, which cannot exist apart from immovable property [Voet 8. 1. 1].

A prædial servitude is the privilege of having or doing something not allowed by the common law upon the land of another person for the benefit of one's own. Some of these servitudes are urban and some rural [Grot. 2. 34. 1]. The personal or non-prædial are the usufruct or right of use of another's property; also rights reserved on grants of land, leases, &c., as tythes, fines, or quit-rents, and the like [V. d. L. 1. 11. 1].

Prædial servitudes

Urban and rural servitudes.

Non-prædial.

Personal servitudes which are conceded to a person are extinguished with his death and do not pass to his heirs. Real or causal privileges cohere to the thing, and are transmitted to the heirs and other successors [Voet 1. 4. 12].

Personal servitudes do not pass to heirs.

It is not the position of but the use to which the property is put which makes the distinction between rural and urban immovable property. Hence gardens, stables, and threshing floors may at one time be counted as urban and at another time rural immovable property, according to the different uses to which they are put [Voet 8. 1. 3].

Rural and urban immovable property.

The title of the servitude is taken from the dominant tenement, that is to say, a servitude is urban when the dominant tenement is such, although the servient tenement may be rural [Voet 8. 1. 4]. A servitude which is naturally a real one may be personal, as for instance, where a right of way, a right to drive or feed cattle or draw water is given to a certain individual without its being transmissible to his heirs. Such a right may have no connection with the ownership or possession of land [Voet 8. 1. 4].

Dominant tenement, test of class of servitude.

Urban or house servitudes are—

Urban servitudes.

(1) *Servitus oneris ferendi*, that is, the right to build upon the wall of another. By the common law no one

Right to build upon wall of another.

may build upon the wall of another, and this servitude arises when one's wall or pillar must support the weight of another's building, or where one may construct his building upon the wall or pillar of another [Grot. 2. 34. 4 ; V. L. 2. 20. 2 ; V. d. L. 1. 11. 3].

This servitude is continuous and perpetual, so that he whose wall must sustain another's building is bound to keep the wall fit for this purpose, and repair it at his own expense. But the support of the building when the wall is being repaired must be undertaken by and be at the expense of the owner of the building [V. L. 2. 20. 4 ; Voet 8. 2. 1].

The necessity of repairing may, however, be avoided by abandoning the servient tenement. During repairs the owner of the dominant tenement must support the weight unless in the meantime he prefers to destroy what constitutes the burden, and to restore it as soon as the supporting wall is in order [Voet 8. 2. 1].

Common wall.

A wall placed by us partly on the land of another and partly on our own is held to be common [Grot. 2. 34. 5 ; V. L. 2. 20. 5], in the same way as whatever is found between two adjoining properties is common, unless exclusive right is clearly shown on the one side or the other by clear or apparent circumstances. The entire property in the thing may be proved by certain signs and marks on the one side or the other, as, for instance, where a beam or "hold fast" is found inserted right through the whole wall from one side, or a window opening through the whole wall [V. L. 2. 20. 5].

Presumption as to ownership of doubtful wall.

A doubtful wall between two houses or gardens, that is one in respect of which both neighbours are without evidence and proof as to who is sole owner, is also presumed to be a common wall. The same rule holds good in respect of wooden fences, empty spaces between two houses, and all other things which lie between two neighbouring properties. A wall built

by one of two neighbours on the common boundary is common [Voet 8. 2. 15]. Wall built on boundary.

Either of the two owners of contiguous property may erect a wall in the place of a rail or fence, but not a fence in the place of a wall except temporarily while the wall is being repaired. No one may put a window in a common wall or make any other opening through it except by common consent, nor may he attach an oven or privy to it, nor anything that may damage the common wall [Grot. 2. 34. 5 ; V. L. 2. 20. 5 ; Voet 8. 2. 16], nor may he attach to it bath pipes or gutters for leading water from a cistern or catching rain water, or destroy and restore it without pressing necessity [Voet 8. 2. 16]. One neighbour may however against the will of the other destroy a wooden fence common to both, and at his own expense substitute a wall of lattice work to be for the future common between the same neighbours [Voet 8. 2. 16]. A common wall as also a common privy must be maintained and kept clean at the common expense [Grot. 2. 34. 6 ; V. d. L. 1. 11. 3], but either party may, if he wishes, terminate the community and give up the whole wall or privy to his neighbour [Grot. 2. 34. 6].

When fence may be erected in place of wall.

Window in common wall.

Oven or privy in common wall.

How common wall is to be maintained.

As to building upon a common party wall, no one can build except upon the half thereof, provided the wall is of such thickness that the half of it can bear being built upon, for in a case of this kind a person is considered to build upon his own ground rather than upon that of another. But, if the wall is not thick enough for the half of it to support what is built thereon, it would not be allowable to do so, on a common wall, without mutual consent, or otherwise the building would likewise to such extent become common [V. L. 2. 20. 3 ; Grot. 2. 34. 4 ; V. d. L. 1. 11. 3 ; Voet 8. 2. 17]. Where one builds beyond the middle of a common wall without the consent of the neighbour but with his knowledge and tacit permission, the neighbour will

Building on common wall.

Building beyond middle of common wall.

have no right to have the building destroyed, but will be entitled to compensation for the trespass; but if the building was erected without his knowledge or against his express wish, he will have a right to have it taken down, unless the matter is controlled by some local custom [Voet 8. 2. 17].

A person cannot be prevented from opening in a wall which is not a common or party wall, but stands wholly on his own land, windows so as to overlook his neighbour's premises [Gren. 3, Part 2, 26].

Right to have beam or support let into another's building.

2. *Servitus tigni immitendi;* that is, the right to have a beam or support let into another man's building, for by the common law no one has the right to have any woodwork projecting over his own boundary line, and whatever so projects must be removed. Whoever has the *jus immitendi* may replace the old beams with new ones, but he cannot exceed the original number, nor insert the beams in a different manner, although they may be of a different shape [V. L. 2. 20. 6; Grot. 2. 34. 7; V. d. L. 1. 11. 3; Voet 8. 2. 2]. The owner of the servient tenement is not bound to repair his wall so as to make it equal to bear the insertion of beams, nor to restore the servient wall if it fall down; and where by agreement leave is given in general terms to insert beams into one's wall, and afterwards the owner of the servient tenement lengthens or widens his wall, no beams can be inserted into the new part. If either of the two tenements falls or is demolished, and is restored, the servitude revives [Voet 8. 2. 2].

Servitus projiciendi.

A like servitude [*servitus projiciendi*] is the right of causing my building to project upon or overhang the land of my neighbour [V. L. 2. 20. 7]. The eaves may thus project over the neighbour's land, when the servitude is termed that of *suggrunda*,* and so may a balcony [Voet 8. 2. 3]. The servitude of inserting a beam differs

* A contraction of *suggerunda*.

from this servitude in this respect, namely, that in the former case it is open to the owner of the wall into which the beam is inserted to cut it off or destroy it, whereas in the latter he cannot interfere with the projection without first proceeding at law against the wrongdoer [Voet 8. 2. 4].

Overhanging trees.

It may here be observed that no one may by the common law allow his trees to overhang the ground of a neighbour. The latter may cause whatever so overhangs his ground to be cut down, and if he does not do so, he is entitled to the fruits which hang over [Grot. 2. 34. 22, 21].

Where the branches of a tree which had rooted in one man's land overhung the property of another, the latter could not in the olden time cut down or thin them without first obtaining a prohibitory interdict from the prætor that no violence should be used against any person when cutting, and except after the neighbour had been warned to cut, and had put off doing so, or refused to do so [Voet 8. 2. 4]. The authority of the court would possibly be necessary at the present day, unless perhaps danger to person or property is to be apprehended by delay.

Damages by fruits falling from overhanging tree.

Owner of tree cannot acquire by prescription a servitude to claim that tree do overhang.

An action lies against a neighbour for damages arising from fruits, &c., falling from overhanging trees [3 Lor. 125]; and the owner of a tree overhanging his neighbour's land cannot by prescription acquire a servitude by reason whereof the latter is bound to suffer the tree to overhang his land [*Coore v. Boteju*, Ram. 1863–1868, 234].

Tree cannot be cut without leave of court.

A landowner has no right, however, without the leave of the neighbouring landowner, to enter on the land of the latter and fell a valuable tree which overhangs his own ground, but should in the first instance sue in court. If there is imminent danger of the tree falling, he will be justified in summarily felling it [*Dias v. Strong*, 1 S. C. R. 103].

In action to cut overhanging tree actual damage need not be proved.

A householder need not prove that he has suffered actual damage in an action to have the overhanging portions of a tree cut down [*Andris v. Dingo*, Ram. 1863–1868, 307].

Joint owner of land supporting overhanging tree.

An owner of a land which a tree overhangs may maintain an action for an order that the tree be cut down, although he is tenant in common with the defendants of the land supporting the tree; but, probably, the joint owner of an overhanging tree has no right to cut it down himself, except with the consent of his co-owners [*Malar v. Kirithatkandu*, 2 S. C. R. 97].

Lessee's rights.

A lessee is entitled to recover damage by the falling of the defendant's tree on a tree standing in the leased premises. He is also entitled to detain the tree until the damage is paid [Gren. 73, Part 2, 52].

Dropright.

(3) *Servitus stillicidii recipiendi* [dropright], that is, the right to let the rain water collected on one's roof drop on to a neighbour's property, every one being, by the common law, obliged to direct his rain water on to his own property. The owner of the tenement subject to this servitude may not build too near to the dominant tenement, but must allow five inches or half a foot for the dripping of the rain water, or as much as local customs and statutes require [V. L. 2. 20. 8; Grot. 2. 34. 12].

Servitus stillicidii non recipiendi.

(4) *Servitus stillicidii non recipiendi;* that is, the right of catching the rain water coming from another's roof or land for one's own benefit; for, otherwise, the water falling upon my roof or land is mine [V. L. 2. 20. 9; Grot. 2. 34. 13].

Servitus fluminis.

(5) *Servitus fluminis*, that is, the right of water-course, to allow one's water to flow on to the property of another who is bound to lead it off over his own land or in a gutter, every one being otherwise, by the common law, obliged to direct his water on to his own property or conduct it through his own property into

the street. This servitude applies to only clean water, and he who enjoys the right must put a grating over the opening of the water-course, so that the dirt may remain behind [V. L. 2. 20. 10; Grot. 2. 34. 15]. A special right may also exist for the conveyance by means of a gutter or sewer of water charged with noxious matter. If a gutter of this kind be stopped, it must be opened and repaired by him only who enjoys the right, but if the gutter be a common one, then he who has evidently caused the stoppage must clean and repair it. In other instances this must be done at the common expense of all those who make use of the gutter, unless it has been otherwise agreed upon [V. L. 2. 20. 11]. It may here be added that lower lands are said to be naturally subservient to the higher as regards the receiving of water. So that, ordinarily, the proprietor of higher land is not liable for injury caused by the flow of water therefrom to lower land. At the same time, in the absence of a duly acquired servitude [*aquæ exonerandæ*] the lower proprietor may by natural free right do anything on his land to keep off water likely to do him injury, and which flows from land above his; and if the upper proprietor by artificial means makes the water to flow on to lands lying lower than his, the lower proprietor may do what he can to prevent the upper proprietor acquiring a right to do this [see Voet 8. 3. 11].

Conveyance of water charged with noxious matter.

(6) *Servitus altius non tollendi*; that is, the right to prohibit a neighbour from raising his building higher, for by the common law every one may build on his own ground to any height he pleases [Grot. 2. 34. 18, 19], inasmuch as he who owns the soil is said to be owner of what is above the soil as far as the heavens [Voet 8. 2. 18]. This right corresponds somewhat to the right to free light next mentioned, which includes the servitude that the light may not be darkened or obstructed by any building; and accordingly a proper distance must be

Servitus altius non tollendi.

Owner of soil is owner of everything above it.

Free light.

observed so that the windows may not be darkened by any building or trees. The right to free prospect, also next mentioned, is more extensive, for it not only includes the light from the heavens above, but also a free and unobstructed view along the earth in a straight line whereby the prospect must be left in the same condition in which it was at the time of the creation of the servitude [V. L. 2. 20. 13, 14].

Free prospect.

Servitus luminibus non officiendi or *prospectus*.

(7) *Servitus luminibus non officiendi* or *prospectus*, that is, the right to prohibit a neighbour from obstructing one's light, or one's view or prospect with his building or trees. By the common law every one may build or plant trees on his own land even though his neighbour's light or view may be obstructed thereby [Grot. 2. 34. 21, 22].

Where a *servitus luminibus non officiendi* exists, and the neighbour builds up anything so as to hide the sun, but not to obstruct the light, there is no infringement of the servitude unless he thereby throws into the shade a place which requires the sun, as for instance, either a balcony or apartment designed to catch the sun [Voet 8. 2. 11].

Right to ancient light under English Law.

Under the English Law the absolute right to the enjoyment of light may, by the Statute 2 and 3 Will. IV., c. 71, sect. 3, be acquired by twenty years' uninterrupted enjoyment. But the right to ancient light may also still be established by proof of enjoyment from time immemorial, although the proof of the twenty years' enjoyment under the statute is interfered with by a temporary unity of possession during that time. In either case, the fact that the windows in a new building are larger than, or that there are other windows besides, those through which the ancient light was enjoyed, does not destroy the right to enjoy the ancient light [*Tapling v. Jones*, 34 L. J. C. P. 342: *Aynsley v. Glover*, 43 L. J. Ch. 778; 3 C. R. C. 1].

The owner of ancient light is entitled not only to sufficient light for the purposes of the business carried on by him at the time of complaint, but to all the light which he has anciently enjoyed [*Yates v. Jack*, 35 L. J. Ch. 539 ; 3 C. R. C. 36] ; and he has a right to restrain his neighbour by injunction from obstructing the access of light so as to render the house which enjoyed the ancient light substantially less fit for occupation [*Kelk v. Pearson*, L. R. 6 Ch. 809; 3 C. R. C. 48].

Right against Crown.

Where there is a servitude against interfering with light or prospect, neither a private person nor the Crown can build so as to obscure the light or obstruct the prospect of another [Voet 1. 4. 9].

Right to passage of air under English Law.

Under the English Law the owner of a dwelling-house may by prescription acquire a right to the passage of air through it by a defined channel; and the enjoyment for forty years without interruption of ventilation by means of air flowing in a definite channel, with the knowledge of the owner and occupier of the adjoining premises, creates a presumption of the grant of such an easement [*Aldred's Case*, 9 Co. Rep. 57 *b; Bass v. Gregory*, 25. Q. B. D. 481 ; 2 C. R. C. 558]. It is an actionable nuisance to cause pollution of the air entering a dwelling-house ; and an action on the case lies for erecting a hog-sty so near the house of a person that the air thereof is corrupted [*Ibid.*].

Window right.

(8) Window right, that is, the right to have a window projecting over the ground of another. This includes the right of free light or *servitus luminibus non officiendi*. By the common law no one is bound to allow this. The mere sufferance, however, of a window projecting over one's land is, by itself and without anything else, no evidence of servitude [Grot. 2. 34. 22, 23].

The right, however, of having fixed windows overlooking another's property cannot be prevented, although they may be darkened and blocked up, unless

a person have the right of prohibiting the view, that is, the servitude whereby another is prevented from overlooking his neighbour's property from his own land [V. L. 2. 20. 16, 17].

Acquisition of certain servitudes by prescription.

Here it may be observed that, as a general rule, such servitudes as forbid or prevent any one from doing something to or upon his own property, and amount as it were to a prohibition, cannot be acquired by a bare sufferance or by prescription through mere possession, unless it is preceded by an express prohibition. And so, the right of not having our lights darkened or obstructed without any preceding prohibition by us followed by further sufferance never can be acquired by prescription [V. L. 2. 20. 18].

Negative servitudes can only be acquired by prescription, if there has intervened some act by which the person claiming the right has asserted it, and the opposite party has yielded to that assertion [*Jordaan v. Winkelman*, Buch. 1879, 79. See Mor. Eng. and R.-D. Law 36].

It was, however, held in the case of *Neate v. Abreu* [5 S. C. C. 126; Wendt 188] that such a servitude could be acquired by prescription under Ordinance No. 22 of 1871, even in the absence of such an antecedent prohibition as is here referred to.

A person is entitled to an injunction for the prevention of the construction of buildings interfering with the free access of light and air to his house; but an injunction is not to be granted where he has been guilty of laches in having allowed three or four years to elapse before applying for the remedy [*Pillai v. Tambi*, 2 S. C. R. 59].

Right of gutter.

(9) *Right of gutter* [*goot-recht*], that is, the right to have a gutter or spout lying upon or discharging itself into the property of another. By the common law no one is bound to allow this. Upon a common wall, however, either neighbour may lay a gutter leading

into the streets, in which case such gutter is also common property. Whoever has the right of gutter may neither raise nor lower such gutter so as to be a greater burden, and must maintain it at his own sole cost [Grot. 2. 35. 24–26].

Servitus non projiciendi.

(10) *Servitus non projiciendi*, that is, the right to forbid a neighbour from looking from his property on to that of another, which otherwise every one may do under the common law [Grot. 2. 35. 27].

Other servitudes.

There exists also the right of allowing smoke from a cheese shop to escape into the buildings above, the right of emptying or throwing away water or anything else from a height into the court below belonging to a neighbour, the servitude which prevents a man from having anything placed on his property so long as by any chance it is prejudicial to his neighbour's property or to make his neighbour's court a stage or scaffolding for building [Voet 8. 2. 14].

Rural servitudes. Footpath.

Rural servitudes are (1) the Right of Footpath (*iter*), that is, the right to go on foot over the land of another [Grot. 2. 35. 2 ; V. d. L. 1. 11. 2]. It includes the right of going and passing backwards and forwards, and so of going and returning. It is also the right which a man has of going to and fro on foot or on horseback or of being carried in a litter or sedan chair [Voet 8. 3. 1].

Bridle road.

(2) The Right of Bridle Road, that is, the right to ride on horseback over another's land. This right includes the right of footpath, as the greater includes the less [Grot. 2. 35. 3; V. d. L. 1. 11. 2].

Servitus actus.

(3) The *servitus actus*, that is, the right to drive cattle over the land of another, which includes the right both of footpath and bridle road [Grot. 2. 35. 4 ; Voet 8. 3. 2].

Servitus viæ.

(4) The *servitus viæ*, that is, the right to pass with horses and wagons over another's land, which includes the right of footpath, bridle road, and *actus*. Whoever

is entitled to any of these privileges must exercise the same in a kindly manner and with the least possible injury to his neighbour [Grot. 2. 35. 5, 6; Voet 8. 3. 3].

Necessary way.

(5) The Right of Necessary Way, that is, a way to be used only for the purposes of the harvest, of interment, or of some other necessity. Owners of all lands which do not abut upon a high road or neighbour's road are entitled to a way of necessity. The court will grant them a necessary road whereby to reach the high road by the shortest way and with the least damage. A person who is bound to allow a necessary way is not prohibited from digging up or enclosing his land; but if required in case of necessity he is bound to open it [Grot. 2. 35. 7, 8, 11, 12; Voet 8. 3. 4]. High roads [*viæ publicæ*], it may here be observed, are roads common to all which may be used by every one, the profits thereof going to the Crown [Grot. 2. 35. 9]; and neighbours' roads [*viæ vicinales*] are roads belonging to several neighbours in common, and may not be closed except by common consent, the profits thereof going to the neighbours [Grot. 2. 35. 10; D. 43. 11. 12].

High roads.

Neighbours' roads.

Public road.

Under the Roman-Dutch Law, a public road is either a road which has been constituted as such by the public authorities, or one which has been used as a public road by people inhabiting the neighbourhood from time immemorial [*Allishamy v. Arnolishamy*, 1 Tamb. 26. See Bruyn's Op. of Grot. 65; *Peacock v. Hodges*, Buc. Rep. 1876, p. 65].

Injury to public road.

Any person using a public road may prosecute in respect of an injury to it [3 Lor. 311].

Undefined way is not public road.

The enjoyment of an undefined right of way for the passage of carts over a person's land does not necessarily constitute that right of way a "thoroughfare" within the terms of Ordinance No. 10 cf 1861 [*Gunaratne v. Abdul Carim*, 4 S. C. C. 95]. The public

highway cannot be prescribed for by a private person by virtue of any length of possession [*Queen v. Eduljee*, Ram. 1843–1855, 105 ; V. L. 2. 8. 12]. No prescription against public road.

An action for damage for the obstruction of a public path cannot be maintained unless special injury to the plaintiff is shown [*de Silva v. Weerasinghe*, 1 N. L. R. 308 ; D. C. Jaffna, 8,690, 2 S. C. C. 195]. No action for damage without special injury.

All persons are entitled to pass and repass along a public highway unmolested, and anything which interferes with this right or renders the passage less convenient is a public nuisance giving rise to an action for damages occasioned thereby. In an action for damages arising from the frightening of passing horses by objects placed on or near the highway, negligence has nothing to do with the cause of action. It should be proved that the objects were such as were likely to frighten ordinary horses, and that the damage was occasioned directly by such objects. The mere placing temporarily by the roadside of a bag of rice is not in itself an unreasonable use of the road, or necessarily a public nuisance, nor would the removal of it from the wheel track, as a horse is coming up, render the remover liable in damages, if the horse seeing the act of removal take fright and injure the carriage and harness [*Lewis v. Meera Lebbe*, 3 N. L. R. 138]. All persons entitled to pass and repass. Nuisance.

As to high roads, Ordinance No. 10 of 1861 as amended by Ordinance No. 31 of 1884 and Ordinance No. 18 of 1885 makes provision respecting them. For the removal of encroachments power is given to Provincial and District Road Committees to demand and enforce production of title deeds by landowners who are suspected of having made encroachments [sect. 84 *et seq.*] ; and provision is also made for the prevention of injuries to thoroughfares and abatement of nuisances thereon [sects. 91, 94 *et seq.*]. Encroachments, &c., on thoroughfares.

(5) *Aquæ haustus*, that is, the right to draw water from the well or tank of another. This includes the *Aquæ haustus.*

Right of servitude includes right to everything appurtenant to it.

right of footpath, for whoever is entitled to a servitude is also entitled to everything without which he would not be able to enjoy the servitude. Whoever has this right must contribute to the maintenance of the well or tank [Grot. 2. 35. 13; Voet 8. 3. 7].

Aquæ ductus.

(6) *Aquæ ductus*, that is, the right to lead water out of the stream of another [Grot. 2. 35. 14; Voet 8. 3. 6]. From *heere-wateringen* [running or stagnant waters] or *han-wateringen* [water-courses maintained by the labour of the rural population] every one may lead water on to his own ground in so far as the same is not forbidden by the charters [Grot. 2. 35. 15]. The possessor of land through which a natural stream flows has a right to the advantage of the stream flowing in its natural course and to use it reasonably for his own purposes [*Embrey v. Owen*, 6 Exct. 353; *Miner v. Gilmour*, 12 Moore P. C. 131; 10 C. R. C. 179]. All riparian owners, whether on the banks of a natural or of an artificial stream, have a right to the purity of the water [*Wood v. Waud*, 3 Ex. 748; 10 C. R. C. 226].

Right to use of natural stream.

Right of drainage.

(7) The Right of Drainage [*waterloozing*], that is, the right to drain or discharge the water from one's own land on to that of another [Grot. 2. 35. 16].

Right of ford.

(8) The Right of Ford, that is, the right of passing through another's water and the right of watering cattle at another's water [*servitus pecoris ad aquam appulsus*]. These are also cases of rural servitudes [Grot. 2. 35. 19].

How servitudes are acquired. Servitude over house belonging to several co-owners.

Servitudes are acquired—(1) By grant and subsequent sufferance. A house belonging to more than one cannot be subjected to a servitude except by consent of all the proprietors [Grot. 2. 36. 1–4]. When a servitude is granted, all things are considered at the same time as granted without which the servitude would be useless [Voet 8. 2. 18.] (2) By last will. (3) By prescription, that is, when the servitude has been enjoyed for

a third of a century, unless indeed the servitude was enjoyed merely during pleasure [Grot. 2. 36. 1-4].

The granting and giving of servitudes are by law included amongst alienations of immovable property [Grot. Tr. Maas. p. 229, n.].

When the owner of two houses has used one with some privilege over the other, and the ownership in the two houses is afterwards severed by transfer without anything being said either one way or the other, each house retains its privileges and burdens as before [Grot. 2. 37. 6].

A servitude may be granted and acquired under a condition or for a certain purpose or with a certain limitation, *e.g.*, a right of way for two houses only or across a particular piece of ground or to be used at certain fixed times [Grot. 2. 37. 7].

How prædial servitudes are lost.

Prædial servitudes are lost (1) By merger of the titles to the dominant and servient tenements, that is, when both come into the hands of one and the same proprietor, for a man cannot have a servitude over his own property [Grot. 2. 37. 2]. (2) By renunciation on the part of the owner of the dominant tenement [Grot. 2. 37. 3]. (3) By something being allowed which conflicts with the servitude; for instance, if a man allows the ground over which he has a right of way to be built upon [Grot. 2. 37. 4]. (4) By destruction of the dominant or the servient tenement. A right of way or of drawing of water may be granted to a particular person, but that does not constitute a prædial servitude [Grot. 2. 37. 5]. (5) By termination of the grantor's title, for, if a person has burdened with a servitude a property to which he had only a revocable title, when his title comes to an end, the servitude also comes to an end [Grot. 2. 37. 6]. (6) By non-user for the third of a century, that is, when the proprietor of the dominant tenement though having the opportunity has for that period of time abstained from using the servitude

either personally or through persons authorised by him, such as usuaries or usufructuaries [Grot. 2. 38. 7].

Non-prædial or personal servitudes.

Under the head of non-prædial privileges or servitudes may be treated (1) Usufruct, (2) *Usus*, (3) *Habitatio*, (4) *Superficies*, (5) *Emphyteusis*, (6) Feudal Tenure, (7) Right to Tithes, (8) *Census*, and (9) Property in Expectancy.

Usufruct.

(1) Usufruct is the privilege of drawing the fruits of the property of another without diminishing the property itself [Grot. 2. 38. 5]. The person who has the right of reversion or forfeiture in respect of the thing of which the usufruct is in another is considered the owner of that thing [Grot. 2. 38. 6].

Usufruct and life interest.

The word "usufruct" properly describes the enjoyment of the use of a thing for any limited time. But as such time is generally the life of the person who enjoys the use, a life interest is generally called a usufruct, and the person who holds a life interest a usufructuary. It is a common form of tenure in South Africa, as when property is left to a surviving spouse for life and after his or her death to the children.

Usufruct of movables.

Although practically confined to immovable property including leasehold, it may also be extended to movable property, even such as is consumed by use, for instance, in the preceding example, the surviving spouse might be left a usufruct of all the property movable and immovable. In the case of a usufruct of ordinary movables, an inventory and valuation of the movables is made, and on the termination of the interest the articles or their value are restored [Mor. Eng. and R.-D. Law, 39].

"Fruit" means natural products and those of labour.

By the term "fruits" is meant not only products that are purely natural, such as grass, or the products of nature aided by man's labour, such as corn, but also such as are wholly the result of man's labour, as the rent of houses and all kinds of profit derived from

things, such as the young of animals, wool, milk, &c. [Grot. 2. 38. 8].

Jus accrescendi in legacies of usufruct.

The *jus accrescendi* has effect in legacies of usufruct. Where the usufruct of the same thing is left to two persons by last will [not so, if by contract], on the failure of one to take, his portion accrues to the other co-usufructuary [Voet 7. 2. 1; 7. 1. 4].

Conditional usufruct.

A usufruct may be established not only simply but also conditionally, either from or to a fixed day or on a fixed condition or for alternate years. Pending the arrival of the day from which or the performance of the condition on which the usufruct is given, the fruits and profits go to the owner [Voet 7. 1. 4].

If a farm with the deduction of the usufruct be left to Titius simply, and the usufruct of the same farm to Sempronius conditionally, the usufruct will, until the happening of the condition, remain with Titius, the owner of the farm. Again, if ownership be unconditionally and legally bequeathed to one person and the usufruct ineffectually and illegally to another, the usufruct goes to the owner [Voet 7. 1. 5].

Where the usufruct of a house is bequeathed to A for five years from the date of the testator's death, and it is provided that the usufruct or full ownership of the property should go to B after the five years, and A dies within the five years, B does not become entitled to the property or the usufruct until the expiration of the five years, but the same becomes the property of the heir, or remains the property of the testator's estate, until the expiration of the five years [Voet 7. 1. 5].

Usufruct with burden of restoring thing to third person is in effect a *fidei commissum*.

Where the usufruct of a single thing or a whole inheritance is bequeathed with the burden of restoring the thing or estate to a third person after the death of the legatee, the ownership with the burden of *fidei commissum* must be considered bequeathed rather than the usufruct [Voet 7. 1. 9].

Difference between usufruct and *fidei commissum.*

It is often necessary to decide whether by the words of a will a mere usufruct is left or full ownership burdened with a *fidei commissum*, for in the former case the ownership subject to the usufruct vests immediately on the death of the testator in him to whom it is given, so that if he dies during the existence of the usufruct, the ownership is transmitted to his heirs; while, in the latter case, the death of the *fidei commissarius* during the lifetime of the *fiduciarius* releases the property from the burden of *fidei commissum*, and makes the *fiduciarius* absolute owner [Voet 9. 1. 13].

When a testator having the bare ownership of a thing devises its full usufruct, the better opinion is that he is to be taken to leave the hope of a usufruct to be acquired at some future time [Voet 7. 1. 15].

If a testator bequeaths the usufruct of "all his property" to one person, and a particular house or some other single thing to another, the usufruct of the house will not go to the usufructuary, but it will vest in full title in him to whom it is devised [Voet 7. 1. 17].

When a usufruct is left of a house and everything in it, such things as are found stored in it for commercial purposes are not considered included [Voet 7. 1. 19].

Rural servitudes to be conceded to usufructuary.

By the grant of the usufruct of a farm or granary the rural servitudes must be conceded to the usufructuary by the heir and the use of appliances. The ownership of trees blown down by the wind does not pass to the usufructuary [Voet 7. 1. 22]. By a bequest of the use of a wood the right of cutting wood passes, but the custom as to the preservation of the nobler trees must be observed [*Ibid.*].

Usufruct of alluvion.

Where land is increased by alluvion, usufruct of the alluvion belongs to the usufructuary, except in the case of an island rising in a river adjoining the estate [Voet 7. 1. 23].

Right of fowling, fishing, &c.

As to the right of fowling, fishing, hunting, &c., on usufructuary land see Voet 7. 1. 23.

The usufructuary has also the right to mine in the usufructuary land, and he may take the metal, chalk, sand, and stones therein except such as have been already cut or dug out [Voet 7. 1. 21]. In the case of a usufruct of a flock the usufructuary must make good out of the young or increase any deficiency in the flock [Voet 7. 1. 26]. Right to mine.

Fructus, that is, ripe fruit not gathered at the time of the death of the usufructuary, goes to the owner and to the heir of the usufructuary, but the owner must make to the heir of the usufructuary compensation for expenses incurred to induce the yield [Voet 7.1.27]. As to *fructus civili*, *e.g.*, rents, the rents of the last year of the usufruct are to be divided between the proprietor and the usufructuary in proportion to the time of enjoyment during such year. The same may be said as to interest on money put out on pledge, &c. [Voet 7. 1. 30]. Ripe fruit not gathered at death of usufructuary. Money put out on pledge.

The usufructuary must use the property in a kindly manner according to the opinion of good men. If he treat the property otherwise, he is bound to make compensation for damage, and he must also replace by new ones from the increase such trees of an orchard or cattle of a flock as have perished [Grot. 2. 38. 9]. After the expiration of his term the usufructuary must return the thing in a good state to the owner. For this he is bound to give security. He may not alienate or incumber the thing. He is liable for the usual costs and charges of keeping it in a proper state [V. d. L. 1. 11. 5]. Usufructuary must use property in a kindly manner and replace lost things.

On the other hand, the proprietor of property subject to a usufruct can do nothing to the prejudice of the usufructuary. He cannot change the form of the property so as to injure or diminish the usufruct. He can acquire a servitude for the usufructuary property, but he cannot lose it when once acquired, and not even with the consent of the usufructuary can he Proprietor of property subject to usufruct can do nothing to the prejudice of usufructuary.

himself acquire a servitude on the usufructuary property, except in such a manner that the usufructuary's condition is not made worse, and unless it be a servitude in favour of religion [Voet 7. 1. 20]. The proprietor, so long as he does not injure the rights of the usufructuary, may exercise his rights of ownership by selling, bequeathing, and giving away the usufructuary property [*Ibid.*].

Usufructuary may enjoy all accession to usufructuary property.

The usufructuary can enjoy almost all the profit both of the usufructuary property and its accessions. Thus, on the grant of the usufruct of a house, the usufructuary can use the appliances of the house with it and the gardens and such outhouses as form part of the buildings and are usually provided for the sake of more comfortable living, and also those outhouses which form part of the building for stabling cattle, &c. [Voet 7. 1. 21].

He should not change form of property.

The usufructuary should not injure the position of the owner or change the form of the property if, for instance, a house. Although he may let in windows and put up paintings, &c., and otherwise adorn the house, he cannot alter the character of the house by the alteration of rooms, means of exit, &c., or put the house or any part of it for purposes for which they were not originally intended. He cannot finish a building left incomplete, since a usufruct is not to be considered established over such buildings as are unfit for use. But if the usufructuary without right put up buildings, he cannot afterwards remove them, nor can the proprietor pull down a house against the wish of the usufructuary which he has erected on the usufructuary property [Voet 7. 1. 21].

Sale or lease by usufructuary.

The usufructuary may sell or lease the usufructuary property. On the extinction of the usufruct, however, these dispositions cease to be operative, but in the case of a lease of lands the lessee cannot be ordered at an inconvenient time to quit immediately but only

after ample previous notice and reasonable time during which he may seek another land or building [Voet 7. 1. 32]. He may pledge his usufruct [*Ibid.*], and may take steps at law to stop everything that is a hindrance to the usufruct and seems calculated to bring loss on the usufructuary property [Voet 7. 1. 33], and may maintain an action *rei vindicatio* in respect of the usufructuary property [*Ibid.*].

May pledge

Custody of deeds relating to usufructuary property.

Although the usufructuary has the right of detention of the usufructuary property, he has not the custody of the records and other deeds relating to it. He may, however, rightly demand these from the owner, if required to institute or defend an action against a third party [Voet 7. 1. 34].

Expenses of gathering the fruits.

The usufructuary must bear the expenses incurred in gathering the "*fructus*," in collecting fines, in asserting his usufructuary right, but not in an action which he brings for the ownership of the usufructuary property or for the collection of debts. These expenses he deducts at the termination of the usufruct [Voet 7. 1. 35].

Repairs.

Moderate repairs fall on him, so that he may keep the property in the same condition in which he received it. But if buildings whose restoration would require a great outlay fall through age, he is not bound to repair them; but if he should effectively rebuild them, he may legally demand what was spent for that purpose [Voet 37. 1. 36].

Burdens of taxes, &c.

The usufructuary must also bear the burdens of stipends, temporary taxes, ground-rent, rates, and the like. But the heavier unusual charges not proportionate to the "*fructus*" do not fall on the usufructuary. Expenses of this nature, if incurred by the usufructuary, must be made good to him at the termination of the usufruct [Voet 37. 1. 38].

Payment of taxes by usufructuary

The usufructuary is not bound to pay out of the "*fructus*" the debts of the testator, and if he pay

taxes, &c., on the usufructuary property that had become due in the testator's lifetime, he can lawfully demand their repayment [Voet 7. 1. 41].

Life usufruct is for lifetime of usufructuary. He must give security to use property well.

A life usufruct is a usufruct for the lifetime of the usufructuary. It takes place with respect to movable and immovable property, but not with respect to consumable articles. The life usufructuary is bound to give security to the owner not to use the property in an improper manner. He may not transfer the usufruct to another, but he may allow another to take some of the fruits. He may, however, burden the usufruct. He is bound to keep the usufructuary houses in good state of repair at his own cost; but new buildings and other expenses which arise seldom fall to the lot of the owner. He may not cut down any trees except such as are fit and proper to be cut down [Grot. 2. 39. 1–7].

Transfer of usufruct by life usufructuary.

The question whether if a life usufructuary transfers his usufruct he forfeits the usufruct in favour of the owner, has been differently answered by different jurists. The tendency of legal opinion would appear to be in favour of such forfeiture [see Grot. Tr. Maas. p. 236, n.].

How life usufruct is acquired.

Life usufruct is acquired by agreement and subsequent sufferance, by last will, by prescription of a third of a century, and by a decree of court in the case of the distribution of an estate or the division of land [Grot. 2. 39. 8–12; Voet 7. 1. 7].

How life usufruct is lost.

It is lost (1) by the death of the usufructuary. Here the ripe fruits which have not been gathered do not go to the heirs of the usufructuary, but to the owner. The rent of lands and houses, however, are divided in proportion to the portion of the period of the lease which elapsed before the death of the usufructuary [Grot. 2. 39. 13]. (2) By destruction of the thing which is the subject of the life usufruct, *e.g.*, by an inundation which alters the character of the land, or by the house

being burnt down. (3) A usufruct bequeathed to a town, guild, or other corporation expires when the corporation is dissolved, and if not dissolved, at the end of a century [Grot. 2. 39. 15]. (4) By renunciation made by the usufructuary in favour of the owner [Grot. 2. 39. 16]. (5) By merger or consolidation of titles, as when the usufructuary acquires the ownership. (6) By non-user for a third of a century [*Ibid.*] and by abandonment of the usufruct by the usufructuary [Voet 7. 4. 3]. It also perishes on the arrival of the day until which or the condition upon which it had been granted [Voet 7. 4. 11]. A usufruct left up to a certain time perishes upon the death of the usufructuary before the arrival of that time, but not in the other ways in which usufruct otherwise usually perishes [Voet 7. 4. 13].

Usufruct does not perish by alienation, noxal surrender by the owner, or usucapion of the ownership [Voet 7. 4. 14].

Owner's rights on extinction of usufruct.

He who has the bare ownership begins to be owner in full title on the usufruct being extinguished [Voet 7. 4. 14].

Things which perish by use.

Although, as stated above, there can be no life usufruct of things which perish by use, custom has introduced a *quasi* life usufruct with respect to such things, so that the usufructuary must give security after valuation of the property for the return to the owner at the death of the usufructuary not of the same thing but of the same quantity. So that, if one bequeaths to any person the life usufruct of all his property, the legatee may use and consume even things which perish with use under security and valuation as aforesaid [Grot. 2. 39. 20].

Usus.

(2) *Usus* or use is a privilege less than usufruct, and is the right to derive benefit from a thing but not to take all kinds of fruits [Grot. 2. 44. 4; V. d. L. 1. 11. 6]. It is in fact the right of using the property of another

so far only as is necessary for one's daily wants. It does not admit of the *jus accrescendi* like usufruct. The *usus* of a property may be left to one while the usufruct is left to another. In this case the usufructuary gets the *fructus* of the property after deduction of so much as is necessary for the daily wants of the usuary [Voet 7. 8. 1].

How long it lasts.

Usus lasts for the lifetime of the person to whom it is granted. It consists, in reference to land, in the occupation of the same without hindrance from the owner or his workmen, and in the right to take fruits, vegetables, flowers, hay, and wood for daily consumption, but not to transfer the enjoyment of the same to others either gratuitously or for value; in reference to a house, in the right to inherit the same unless indeed the house be too large for one family; and in reference to animals, in the right to use them for draught purposes, to take their manure and milk for consumption, but not to appropriate their wool or increase [Grot. 2. 44. 6].

Right of grazing.

The right of grazing on common land is also classed under this head, and is larger or smaller according to local custom, and so also is the hereditary right of fishing in another's water [Grot. 2. 44. 7; Voet 8. 3. 10].

A usuary cannot sell or give the *usus* to another, nor can he let the usuary property, unless the testator intended that it might be, or unless the property, without its being let, would be useless to the usuary [Voet 7. 8. 4].

How acquired and lost.

Use is acquired and lost in the same way as life usufruct, except that hereditary use is not lost by death [Grot. 2. 45. 10].

Habitatio.

(3) *Habitatio* is the right of dwelling in or inhabiting the house of another, its substance being preserved intact. It is a use for life, but he who has the right granted to him cannot give it, but can let it to another [Voet 7. 8. 6; Grot. 2. 44. 8]. This servitude perishes by the death of him to whom it was granted,

but not by the death of the grantor [Voet 7. 8. 7]. It does not perish by non-user [Voet 7. 8. 8].

Security in cases of *usufruct, usus,* and *habitatio.*

Security is usually given in the cases of *usufruct*, *usus*, and *habitatio* by the person entitled to enjoyment to the person who is entitled to the property subject to the servitude [Voet 7. 9. 1].

Jus superficiarium.

(4) The *Jus superficiarium* is the right which a person has to a building standing on another's ground. This is not full ownership, for no one can legally be full owner of a building who has not the ownership of the ground. It is the right to build on the ground and to hold and use the building so erected until such time as the owner of the ground tenders the value of the building or the amount agreed upon [Grot. 2. 47. 9]. This right is acquired and lost like immovable property, and is presumed to be granted when the owner of the ground allows another person to build on his ground [Grot. 2. 47. 10]. The right may be alienated [Grot. 2. 47. 11].

How acquired and lost.

Emphyteusis.

(5) *Emphyteusis* or quit-rent tenure is the hereditary usufruct of another's immovable property subject to a yearly canon or quit-rent—hereditary, because it does not end with life, but passes to all heirs unless it is restricted to a particular family, in which case it may go to females as well as to males, to persons legitimate by birth as well as to those who have been legitimated, and in default of all these even to natural children. But if granted simply without restriction, it passes in the same manner as freehold property [Grot. 2. 40. 3]. The right may be granted for a certain time only or under particular conditions, so that it may terminate before the descendants of the first *emphyteuta* or quit-rent holder come to the succession [Grot. 2. 40. 4; see Voet 6. 3].

An *emphyteuta* may, in the absence of special agreement or local custom to the contrary, alienate his right to another, saving to the owner his right of *naasting* (*jus retractus*) within a year after receiving notice: but if any part of the quit-rent be sold, the owner will

not be bound to split up the rent, but may demand it as a whole [Grot. 2. 40. 7, 8].

The holder must keep the property in good condition at his own expense. He may not cut down any fruit-bearing trees or do any similar damage, but he may burden the property with servitudes so far as he himself and his assigns are concerned, but not to the prejudice of the owner [Grot. 2. 40. 9].

How acquired. *Emphyteusis* or quit-rent tenure is acquired by grant, last will of the owner, prescription of a third of a century, transfer from the quit-rent holder to another, last will of the quit-rent holder, and by division of an inheritance, in which case the lord or owner has no

How lost. *naasting*. It is lost by failure of the issue of the first holder, or by the expiration of the prescribed time or by fulfilment of the stipulated condition; by prescription, that is, non-user for the third of a century; by the merger of the titles; by non-payment of the yearly rent for the space of three years, whereby the right is forfeited to the owner; in such case the owner may not himself eject the holder, but must recover his quit-rent by judicial process; by transfer; by destruction of the property and by forfeiture for crime [Grot. 2. 40. 16–23].

Emphyteutic or quit-rent grant, it may be observed, is an agreement whereby one person binds himself to give another emphyteutic or quit-rent tenure of property, and the other to accept the same under emphyteutic or quit-rent obligations [see Grot. 3. 18].

When emphyteutic tenant may abandon the emphyteusis.

An emphyteutic tenant may abandon the emphyteusis if the fruit and produce, which have been partly destroyed, are insufficient to pay the quit-rent, and the direct owner will not reduce it proportionately. He cannot abandon it if he holds from the Treasury, or the property has been partially destroyed through his own negligence. If the tenant was forcibly ejected by some one else, or otherwise prevented from obtaining the

produce, he cannot, on that account, claim to pay less quit-rent. A remission of rent cannot be claimed because of unusual unproductiveness, inroad of enemies, or levying heavy taxes, unless the quit-rent were proportioned to the produce. A remission may be claimed if the whole property has been taken by an enemy in time of war, and so belongs to the hostile power [Voet 4. 3. 17 *et seq.*]. When remission of rent may be claimed.

When an emphyteusis was made over by sale, donation, or other title by one tenant to another, the latter had to pay the direct owner a part of the price [a fifteenth usually] as a recognition of his direct ownership. This was called payment of *Laudemia*, and in Holland consisted for the most part in the payment of a sum equal to double the quit-rent [Voet 6. 3. 26]. *Laudemia.*

(6) Feudal Tenure is defined as a hereditary indivisible usufruct of the immovable property of another with the reciprocal obligations of protection on the one side and of homage and service on the other. For its incidents see Grot. 2. 41. Feudal tenure.

(7) The Right to *Tythes* consists in the eleventh part of some fruits, whether of corn, which are termed "great tythes"; or of other fruits, which are termed "small tythes"; or of the young of beasts, which are termed "crying tythes" [see V. d. L. 1. 11. 6; Grot. 2. 45]. Right to tythes.

(8) *Census* is the right to receive a certain irredeemable annuity reserved by a person when he transfers the ownership in his property [Grot. 2. 46. 2]. In that the annuity is irredeemable *census* differs from rent charges, which are always regarded as redeemable at the pleasure of the person subject to them, but the receiver of *census* is not bound to allow its redemption unless he pleases [Grot. 2. 46. 3]. He has no right of forfeiture as in the case of a receiver of quit-rent. Hence, the ownership in the property is considered to be in the person liable to *census* [Grot. 2. 46. 4]. *Census* *Census.*

is a quit-rent like other immovable property, and the transfer of it must be made as of other immovable property. It is lost also in the same manner [Grot. 2. 46. 7].

Property in Expectancy.

(9) *Property in Expectancy* is that right which a person has to the property of another by virtue of which the ownership must at some time or other come to him [Grot. 2. 47. 2]. The person who is presently owner of the property has its actual enjoyment, and in that respect resembles a life usufructuary. The difference lies in the fact that in the case of usufruct the person in possession cannot possibly by virtue of his usufruct acquire the full ownership, but in this case the actual possessor in case of the death of the reversioner or party in expectancy, or by his repudiating his right, acquires the ownership by virtue of his present right. This right cannot be acquired by contract or agreement, but may be by last will, and sometimes by antenuptial contract [Grot. 2. 47. 5].

CHAPTER IV.

PLEDGE AND MORTGAGE.

MORTGAGE is that privilege over the property of another which tends to the security of a debt or personal claim [Grot. 2. 48. 1]. Definition.

"Pledge" strictly so called, or "Pawn," was constituted, according to Ulpian, when the thing which was the subject of the contract was delivered to the creditor; while the transaction was called "hypothec" when the possession did not pass. This, however, is not a distinction which was always observed. The word "mortgage" was used in a comprehensive sense as equally applicable to pledges or pawns and hypothecs [Ber. Tr. of Voet, p. 269, n.]. Meaning of "pledge," "hypothec," and "mortgage."

Under the Roman-Dutch Law a mortgage confers no right of property upon the mortgagee but a mere *jus in re aliena*. A mortgagor of land cannot by a subsequent lease confer on the lessee any rights which shall conflict with those of the prior mortgagee, and, according to better opinion, a lessee would not, as against a prior mortgagee, be entitled to preference for improvements on the land even where in the lease there is a clause stipulating for compensation for such improvements [V. L. Kot. Tr., Vol. II., p. 112, n.]. Rights of mortgagee as against lessee.

Whatever belongs to the mortgagor, whether in full or qualified ownership, is mortgageable. Even life usufruct, quit-rent property, and prædial servitudes may be mortgaged [Grot. 2. 48. 2]. But the mortgage of urban servitudes and agricultural implements was forbidden by municipal law [Grot. 2. 48. 3]. What may be mortgaged.

When a thing is mortgaged, its fruits, accessories, &c., also become bound.

When a particular thing is specially mortgaged, the fruits thereof are also bound, and so are all accessories thereto, as when an addition takes place by *alluvium* to a mortgaged field, or the usufruct has subsequently accreted to a proprietary right which had been mortgaged. What is made from the thing pledged is also bound, provided the new form can be reduced to its original material, or the new form has been made by the owner himself or by his authority. Further, what remains of a thing mortgaged and becomes accessory to it by some change of form or improvement remains subject to the pledge; for instance, when the site of a mortgaged house has been converted into a garden, or *vice versâ*, or when a mortgaged house has been burned down and a new house built on the site. The expenses of rebuilding have not to be refunded when the debtor has himself built the new house; but if the destroyed house had been rebuilt by a third party, he being a possessor in good faith, he cannot be compelled to restore the building to the creditors, unless he is paid the cost expended by him in the reconstruction, to such an extent as the mortgaged subject was thereby made more valuable [Voet 20. 1. 4].

Effect of special mortgage of immovables.

The effect of a special mortgage of immovables is that it affects the things themselves, which then pass to any possessor subject to the incumbrance, whether they have been transferred by an onerous or by a lucrative title, and whether the transferee was aware or ignorant of the mortgage. But where the creditor was silent when the mortgaged property was sold by the Fisc, and refrained from asserting his right, he was considered to have lost his right of action *in rem* [Voet 20. 1. 13]. The principle involved here was that the trust reposed in a fiscal sale was not to be lightly upset. The reference is to sales on behalf of the government revenue, but the maxim was applied equally to sales of debtors' estates, &c., under judicial decree [Ber. Tr. of Voet 287].

Silence of creditor at sale of mortgaged property.

Where a debtor mortgages a debt due to himself, the creditor to whom it is mortgaged may owe his debtor's debt even without cession of action [Voet 20. 1. 17].

Rights of mortgagee of debt.

Pledge is indivisible. So, although any one of a plurality of heirs of a single debtor paying his proportion of the debt ceases to be bound to the creditor by personal action, it is open to the creditor to sell his share in the subject pledged by the deceased along with the shares of the other heirs who have failed to pay [Voet 20. 1. 19].

Indivisibility of pledge.

All persons who may alienate have also the right to mortgage [Grot. 2. 48. 5]. The mortgage of the salary of a public officer, however, cannot prejudice the protection given to him against its seizure in execution. It is given for the benefit of the public, and a creditor cannot nullify it by getting a mortgage of the salary inserted in a bond [*Muttaya v. Vanderstraaten*, Ram. 1863–1868, p. 325].

Who may mortgage.

An insolvent may not mortgage, and a mortgage executed previously to his insolvency in fraud of creditors and with the knowledge of the mortgagee may be set aside in like manner as has been indicated already in the case of alienation [Grot. 2. 48. 6].

Mortgage by insolvent.

Mortgage is tacit or conventional.

Tacit or legal mortgage is that which takes place *ipso jure* or by operation of law. Conventional mortgage arises out of the consent of the owner. That which is called judicial mortgage (*pignus prætorium vel judiciale*, *i.e.*, an attachment or arrest) is strictly no mortgage, for it gives one creditor no preference over another [Grot. 2. 48. 8, 9].

Tacit or legal mortgage.

Conventional mortgage.

In Ceylon, the mortgage of land or other immovable property must be in writing signed in the presence of, and duly attested by, a notary and, at least, two witnesses [Ord. No. 7 of 1840, sect. 2]; and no promise, contract, bargain, or agreement which is not in writing

Mortgage of land to be in writing.

and signed by the party making the same or by some person thereto lawfully authorised by him, is of force or avail in law for pledging movable property, unless the same is actually delivered to the person to whom it is intended to be pledged [sect. 21].

The words, " I deposit as security the title deed of," &c., have been held to be sufficient to create a mortgage over the land [3 Lor. 303].

Assignee of mortgagee.

A mortgagee cannot by assignment of his rights put his assignee in a better position than he himself stood in. The assignee is bound by the equities of his assignor's contract [*Murgappa v. Holloway*, 2 S. C. C. 168].

Pactum antichresis.

There is sometimes a stipulation [*Pactum antichresis*] in pledge and mortgage that the fruits of the property pledged or mortgaged should go to the creditor for the interest of the principal sum, which is due him, the debtor retaining the power of at all times redeeming his property. In this case, if the fruits of the property pledged or mortgaged amount to more than the interest, the surplus must go in reduction of the principal sum [V. L. 4. 12. 5].

Mortgagor cannot redeem when mortgagee is about to realise produce.

In the case of a usufructuary mortgage like the above the mortgagor cannot claim redemption of the mortgage as the mortgagee is about to realise the produce of the mortgaged land, which he was entitled to receive in lieu of interest. The mortgagee having expended money in preparing the land to yield his interest, the mortgagor could only redeem by paying that amount as well as all interest due [*Bandar v. Bandar*, 1 S. C. R. 54; *Siribohamy v. Rattaranhami*, 1 C. L. R. 36; Ram. 1877, 234].

Usufructuary mortgagee ousted from possession.

A usfructuary mortgagee if ousted by the mortgagor from the land mortgaged may sue for damages to date of decree. He is entitled to legal interest thereafter until payment [D. C., Negombo, 2,666, 1 Tamb. 51].

A usufructuary mortgagee may legally lease the property to third parties, and when that is done for a certain term, and afterwards his interest in the property as mortgagee is seized on a writ against him and sold to a purchaser who registers the fiscal's transfer prior to the registration of the lease, the purchaser by reason of prior registration of the transfer to him has a right to the possession of the property preferent to that of the lessee [*Uduma Lebbe v. Mohamado*, 2 C. L. R. 158]. He may lease mortgaged land.

A judicial sequestration of property, says Voet, does not give the person sequestering a right of hypothec over the things detained, nor a preference over other creditors, except perhaps to the extent of the expenses of detention, if any, incurred for conserving the thing. A person making a second sequestration enjoys the same rights as the first; and the property sequestered is not free from becoming thereafter liable to legal hypothec [Voet 2. 4. 64]. Judicial sequestration.

Tacit or legal mortgage, as already observed, is that which take place *ipso jure* or by operation of law. It is not the same as a mere lien or *jus retentionis*, although in some cases of tacit mortgage a *jus retentionis* attaches to it. A person who has effected improvement to land has, in certain circumstances, as shown elsewhere in this volume, a *jus retentionis* until compensation is paid, and on losing possession of the land he still has a personal action for his expenses against its owner, although the land is no longer bound for his claim. So a solicitor has a lien on papers delivered to him as such [*Champernoun v. Scott*, 6 Madd. 93], but on parting with these papers he retains no right of hypothec over them. The papers should have been delivered to him either by his client, or by some other person with the intention of parting with the possession of them absolutely in favour of his client [*Anderson v. Loos*, 2 C. L. R. 66]. Tacit mortgage. Lien or *jus retentionis*. Solicitor's lien.

The solicitor has a lien for his general account. If he waives it by taking in payment of his account a bill payable at a subsequent date, the lien revives upon the bill being dishonoured at maturity [*Stevenson v. Blakelock*, 1 Maule and Sel. 535 ; 24 C. R. C. 694].

Who are entitled to tacit mortgages.

The following are entitled to a tacit mortgage—

For census.

The person who is entitled to *census* over the *census* property for the recovery of his *census* [Grot. 2. 48. 11 ; Voet 20. 2. 27].

For repairing house or other property.

Whoever has lent money for the purpose of repairing a house or ship [Grot. 2. 48. 11 ; Voet 20. 2. 28, 29 ; and 1. 3. 26] or has advanced something for the necessary preservation of certain property [V. L. 4. 13. 8] has a tacit mortgage over the house, ship, or other property. If several persons have advanced money for the repair of the same thing, there will be no preference but concurrence among them, although one of them may have made the advance before the others [V. L. 4. 13. 8]. In case of a ship, however, he who advanced money on bottomry was preferred to a prior mortgagee or holder of a *Bylbrief*, and a subsequent bottomry was preferred to a prior one [V. d. K. 564].

Bottomry.

A person who has lent money for the construction of a house or construction or purchase of a ship has no right of tacit hypothec [Grot. Tr. Maas. p. 282, n.; V. L. 4. 13. 8].

For money advanced for medical attendance, &c. Funeral expenses.

Whoever has advanced money for medical attendances or funeral expenses has a tacit mortgage over all the property of the deceased [Grot. 2. 48. 14]. Under funeral expenses mourning garments are not included [Grot. Tr. Maas., p. 282, n.], and whoever has become surety for the expenses necessary for the preservation of property placed under his care has a similar right of mortgage over it [Grot. 2. 48. 13].

For restoration of church property.

Towns and villages enjoy this right over the property of their receivers and administrators ; and churches, on the goods of the administrators of the church property [V. d. L. 1. 12. 2 ; Grot. 2. 48. 18].

A minor has a tacit hypothec over the property of his guardian for any loss suffered through his negligence or maladministration [Grot. 2. 48. 16; and V. d. L. 1. 12. 2].

For rent.

The lessor of a house has this right over the movable property and animals which are brought into the house by the lessee. In like manner, the lessor of land over the emblements or fruits standing on the land. This right the lessor preserves, if he proceeds against such property immediately after its removal from the land [Grot. 2. 48. 17; V. d. L. 1. 12. 2].

In the case of a lessor of a house the tacit mortgage would extend to property brought in so far as it is the lessee's property, or at least has been brought into the house for the purpose of remaining there with the knowledge and consent of its owner [Grot. Tr. Maas. p. 283, n., and Herb. 263, n.].

The landlord's lien over the *invecta et illata* [goods brought into the premises during the tenancy] is effectual as against the claims of the other creditors of the tenant, so long as the goods remain in the possession of the landlord under a judicial sequestration obtained by him [Ram. 1877, 62].

What *invecta et illata* include.

It matters not what kind of goods the *invecta et illata* consist of. Not only household furnishings properly so called, but gold, silver, ornaments, clothing, arms, gems, the *universitas* of goods for sale, money, oxen, and whatever has been brought into the premises by the tenant, even though he be a minor, are held bound for the rent. The *invecta* of students, whether they be furniture or books, are subject to this hypothec [Voet 20. 2. 4].

Property of third persons taken into the hired premises.

Only such *invecta et illata* are bound by tacit mortgage as are the tenant's own property, unless they have been taken into the hired premises with the consent of their owners with a view to being kept there permanently, or for the use of the tenant, such,

for example, as beds, chairs, and instruments of the art which the tenant exercises in the house. These are bound at least in *subsidium* of any deficiency in the *illata* of the tenant himself. It is only after there has been an actual *illatio* [the bringing of the things into the hired premises] that the landlord's hypothec arises. It is subject to any hypothecation of the things effected before they are brought into the premises [Voet 20. 2. 5].

Things hypothecated before being taken into the hired premises.

Things taken for temporary deposit.

All *illata*, however, are not bound, but those only which have been taken to the land by the tenant with the intention that they are to be left there, and not merely to be kept there temporarily for some special purpose. So, things lent to a tenant for a moderate time, or deposited with him or given in pledge to him, or entrusted to the tenant in the course of his trade, such as wool or thread to a weaver, cloth to a tailor or fuller, are not subject to this hypothec [Voet 20. 2. 5].

Goods of sub-tenants.

The goods of a sub-tenant of a portion only of the premises are bound by this tacit hypothec not only to his immediate lessor but also to the original lessor, to the extent of the amount payable by the sub-tenant as rent to his immediate lessor [Voet 20. 2. 6].

Summary of law as to landlord's lien.

The following summary of the law on this subject is given by Kotze in his translation of Van Leeuwen's Commentaries—"An important question often arises in practice as to the effect of the lessor's tacit hypothec for rent on property belonging to third persons, and found on the premises occupied by the lessee or hirer. In the text [that is, of the Commentaries] Van Leeuwen says that the lessor's hypothec extends to everything brought and kept in the house. In the *Censura Forensis* [4. 9. 3] he, however, qualifies this statement, and lays down the rule, as given by Groenewegen in his note to Grotius 2. 48. 17, viz., that the property of a third person is subject to the tacit hypothec for rent, if brought into the house with the consent of such third person, and

with the intent that it should always remain therein. This view of Groenewegen is also approved by Schorer. But in the *Consult & Adevys, Vol.* 5, *cons.* 52, the rule as to the lessor's hypothec on *omnia illata et invecta* is thus laid down: that the goods of a third person found in the house occupied by a lessee are subject to the lessor's hypothec for rent where the property of the lessee proves insufficient, provided the goods were brought there with the consent of their owner, *and* for the purpose of always remaining therein *for the use of the hirer.* This opinion of the Dutch Jurisconsult, which it is submitted is more equitable, is adopted by Kersteman. Voet [20. 2. 5] also cites this *consult* 52, but states the rule in the alternative. He says that the tacit hypothec extends to everything found in the house, even though it be the property of a third person, provided such property was brought into the premises leased with the knowledge of its owner, and with the intention of remaining there permanently [*perpetuo*] *or* for the use of the hirer. As Voet relies on this 52nd consultation, we should read in the text of Voet *and* for *or* [*seu*], especially as property brought into a house for a short time for the use of the hirer, *e.g.* plate lent for a supper, will not be subject to the hypothec. The 52nd *consult.* is also approved by the 53rd *consult.* in the same volume, and was acted on by the High Court of the Transvaal in *Longlands v. Francken* [Kotze's Repts. p. 256]. There the court [de Wet, C.J., and Kotze, J.] held that a piano and a few other articles of furniture, bought by the emancipated daughters of L with their own money, and brought by them into a house hired by L for their exclusive use, were not subject to the landlord's hypothec for rent. The daughters, moreover, supported themselves by acting as teachers and governesses, and were residing only temporarily with L. But in *Ulrich v. Tonkin* [2 Juta 319] the Supreme Court of the Cape Colony, held that furniture bought by

plaintiff, who was of age, with her own money and brought into a house in which she resided with her mother, was subject to the landlord's hypothec for rent. The court observed: 'The furniture was brought into the house not for a mere temporary purpose, but with the object of its remaining there permanently. The plaintiff had had beneficial occupation of the house with her mother, and brought the property permanently there, and it was clearly subject to the hypothec of the landlord.' This decision is based on Voet, but if we apply the rule laid down by the Dutch Jurisconsult, and adopted by Kersteman, it may be a question whether the plaintiff ought not to have had a verdict, for there does not appear to have been any evidence that the furniture was brought into the house by her *for the use of the hirer*. Where A let a piano upon which his name was affixed, at a monthly rental to the tenant of a certain house, and the landlord seized all the goods in the house for rent due by the tenant, the court held that the landlord's tacit hypothec did not extend to the piano [*Lazarus v. Dore*, 3 Juta Rep. 42]. In *Crowly v. Domany* [Buch. Rep. 1869, p. 205], the same court held that the landlord's tacit hypothec has effect over the separate property of a wife, married by antenuptial contract, who had brought separate property [furniture] into a house rented by the husband, and in which she resided with him. Here the property was evidently brought permanently into the house for the joint use of husband and wife" [V. L. Kot. Tr., Vol. 2, p. 96, n.].

The things subject to the hypothec are defined by Voet in 20. 2. 5. It is not necessary that the things brought on the premises should be intended to remain during the whole period of the lease, but only that they must not be brought for merely temporary purposes. This excludes from the hypothec things sent by third parties to be repaired or otherwise dealt with by the

lessee. *In Lazarus v. Dore* [3. S. C. 42] it was held to exclude the case of a hired piano on the leased premises; and in the case of *Mackay Bros. v. Cohen* [Off. Rep. Trans. IV., 57] that of a piano delivered on the hire-purchase system, of which notice had been given to the lessor on delivery. In the case of *Lazarus v. Dore*, Villiers, C.J., thus discusses the difference between the English and the Dutch Law on the subject—"The general principle, no doubt, is that the goods of the tenant are subject to this tacit hypothecation, and that even the goods of a third party, if brought upon the premises with his consent for the use of the tenant or for other than a merely temporary purpose, are subject to the landlord's preferent claim. But I cannot assent to the proposition that everything found upon the premises must be classed with *invecta et illata*, over which the right of the owner of the premises extends. It may be quite true that by the Law of England as well as of Scotland the landlord's rights extend to things belonging to third persons and let on hire to the tenant; but these extensive rights appear to me to be remnants of the feudal system which once prevailed in those countries, and which certainly ought not to be accepted as a model for our imitation" [Mor. Eng. and R.-D. Law, 154]. There is a special protection to the sub-lessee, whose goods are only liable to the hypothec to the amount which the sub-lessee owes the lessee in the way of rent [*Ibid.*].

Goods of sub-lessee.

Necessity to sequester *invecta et illata* to enforce tacit **hypothec.**

We must remember, however, says Voet, that now with us and in many other countries the right of tacit pledge in the "*invecta et illata*" of a tenement whether rural or urban has no force, unless they are sequestered [*præcludantur*] by public authority while they are still in the tenement; or unless, when the tenant removes them, they are seized by a vigilant creditor in the very act of removal, in which case the things which had begun to be transferred, but had not

yet reached the place destined for their concealment, are to be taken back to the land. The sequestration not only confirms the lessor's right of hypothec,but also gives him a preference. If the removal of the *invecta et illata* is completed before sequestration, the owner of either a rural or an urban tenement has no longer any right of mortgage or preference over the goods removed; but if the *invecta* have been removed clandestinely after having been duly sequestered, the tenant can be compelled by judicial authority to bring them back to the tenement in which they were sequestered, and so long as this has not been actually done, the right of preference is not revived to the landlord to the prejudice of other creditors, who have no privilege but only a right of personal action against the debtor, and much less to the prejudice of persons acting in good faith to whom the tenant intended that the ownership of the fraudulently removed goods should be transferred by an onerous title, *i.e.*, for valuable consideration [Voet 20. 2. 3].

Lessor's hypothec arises without legal process.

The hypothec upon the lessee's property on the leased premises arises, *ipso facto*, without legal process, so far as regards the lessee. But, as it ceases to exist over goods that have been removed, unless they have been arrested while actually being conveyed away, the usual course is to attach the goods, or obtain a provisional interdict against their removal. Voet, indeed, says that the hypothec has no force until the goods have been attached by a legal officer [20. 2. 3]; but this must be taken to mean that the hypothec has previous to the attachment no force against third parties [Mor. Eng. and R.-D. Law, 154].

For freight.

Ships and their cargo are bound to the master and crew for the freight. A ship is held to continue in existence so long as its keel is in existence [Grot. 2. 48. 19; V. d. L. 1. 12. 2].

A ship belonging to the master is bound to the merchant for compensation for cargo sold by the master, provided the merchant proceeds against the same within a year, and produces the master's seal in evidence in case the ship has passed into the hands of a third party [Grot. 2. 48. 20; V. d. L. 1. 12. 2].

Ship is bound to merchant for compensation.

A merchant's factor has this right of tacit hypothec over the merchandise entrusted to him for any loss he may incur by extending his credit for the owner of such merchandise [Grot. 2. 48. 21], and for advances to the owner on the goods [V. d. L. 1. 12. 2].

Merchant's factor's hypothec.

Persons entitled to fines or quit-rents enjoy a tacit hypothec over the property in respect of which the fines or quit-rents are due. For dyke duties levied to keep the dykes in repair, and for levies in respect of dams, sluices, walls, and the like there is a legal hypothec over the property of persons liable to pay the tax [V. d. L. 1 12. 2].

Tacit hypothec in favour of persons entitled to fines and quit-rent.

Masons, carpenters, builders, and others are entitled to a legal hypothec over buildings and ships for the repairs, but not for the ornaments and improvements made by them. By the local Ordinances of different towns this right was limited to repairs done within the last two or three years. A person who had lent money for the purpose of building a new house or ship or buying a ship did not acquire a right of tacit mortgage. But the tacit mortgage allowed to one who restored or renewed a building extended to the necessary repairs done to a building or a ship [V. d. K. 417; Grot. Tr. Herb. 362, n.].

Hypothec in favour of builders, &c.

The Crown had a hypothec on the goods of those who were in any way employed in the collection of the revenue. In other cases, where the Crown was a creditor with others of an insolvent estate, it had no further right than other creditors, nor with respect to fines and penalties [V. d. L. 1. 12. 2; Grot. 2. 48.

Right of Crown over collectors of revenue.

15; Grot. Tr. Maas. p. 282, n.]. The State had also a tacit mortgage over the goods or property of those who were indebted in taxes, whether real or personal. This right had also been given to those who farmed taxes. A similar right belonged to the State over the property of its administrators or officers as well as over the property of those with whom it had entered into any contract [V. d. K. 419. 420].

Right of hypothec of Fisc over property of administrators of its affairs.

The Fisc and the Chief of the State, says Voet, had a legal hypothec over the property of administrators of the affairs of the Fisc and Prince and of those with whom the Fisc had contracted, and also over the property of citizens for taxes and imposts, whether they be the ordinary taxes and burdens or extraordinary ones imposed on public emergency, and whether due to the Fisc itself or to a city to which the Prince had conceded authority to exact taxes. Towns also had a legal hypothec over the property of renters of taxes and over that of their partners and sureties. And when *tributa*, *census*, or *vectigalia* had been leased to publicans, they also had an hypothec for the exaction of these over the goods of those who owed them, but in the case of these publicans they were required to enforce their demands within certain fixed periods at the risk of losing their right of hypothec [Voet 20. 2. 8].

Wife's lien over property of husband.

A woman who has married without the community of goods has a hypothec on the property of her husband for the restitution of the property bought by her on marriage or acquired by her during marriage. And legatees on the property of the testator for the security of their legacies [Voet 20. 2. 20, 21].

Legatee's lien.

Legal hypothec of pupils over property of their curators.

Pupils and minors have a legal hypothec over the property of their tutors and curators. This hypothec exists equally whether the curator is one appointed generally or for a special purpose, as for instance a curator *ad litem* to a pupil or minor [Voet 20. 2. 11].

A right of legal hypothec may also be asserted in favour of madmen and insane persons, prodigals, the infirm, the deaf, the dumb, and generally all to whom curators are appointed by judicial decree on account of age or any defect of mind or body [Voet 20. 2. 13]. In favour of insane persons, &c.

This right of legal hypothec is acquired by pupils, and the like over the goods of their tutors and curators from the moment when the tutorship or curatorship devolved, and not merely from the time the tutor commenced to act with negligence or fraudulently; and they are therefore preferential to all to whom a special hypothec has been given after the devolution of the office. If the same tutor has several tutorships, and his property is insufficient to indemnify all the pupils, those are preferent, the tutorship of whom was the oldest or which first devolved on the tutor [Voet 20. 2. 17]. When this right is acquired.

A common carrier has, under the English Law, a right to his fare for the carriage of goods, and may retain the goods until it is paid [*Skinner v. Upshaw*, 2 Ld. Raymond, 752; 5 C. R. C. 281]. Right of common carrier.

In the foregoing pages, in treating on the right of tacit or legal hypothec we have dealt sometimes with the right of Retention or Lien which, in some cases, is accessory to the right of hypothec. We shall now point out the cases to which the right of retention more specially applies.

Retention [or lien] is the lawful detention by a person of a thing in his possession for the payment or restitution of a debt, costs, or expenses; and by it a person provides for his own indemnity, until he acquires what is due to him in regard to the same thing [*Cens. For.* 1. 4. 37. 1]. Right of retention or lien.

A vendor who is still in possession of the thing sold has this right of retention over it until the purchase price is paid [*Ibid.*]. Lien of vendor of goods.

Of widow for dowry, &c.

A widow who is in possession of goods of her husband may retain the same until restitution is made, from his estate, of her dowry or portion or her private and separate property, and any gain which is due to her from her husband's estate on any agreement, will, or local statute [*Cens. For.* 1. 4. 37. 3].

Of lessor.

A lessor has this right in regard to property brought on the premises let, and in respect of which he has, as explained already, a legal hypothec. He can keep and detain this property until he obtains satisfaction [*Cens. For.* 1. 4. 37. 4 ; 1. 4. 9. 3, 4].

Of possessor for expenses and costs in respect of thing possessed.

A person to whom anything has come without any wrongful act on his part is entitled to this right for the expenses and costs incurred in connection with the thing detained, either in improvements, preservation, or necessary work. And so, a possessor who has at any time been in *bonâ fide* possession of another's property as heir, if he is condemned to restore the same, enjoys the right of retention for the recovery of any debt paid by him in the name of the heir, or any other expenses in connection with the property [*Cens. For.* 1. 4. 37. 6].

Of lessee.

A lessee has the right to retain, or deduct from, the stipulated rent all necessary expenses incurred in repairing the house or dwelling let [*Cens. For.* 1. 4. 37. 7].

Of carriers.

This right is enjoyed by carriers and couriers in regard to the things carried, for the recovery of the carriage and expenses which they have incurred [*Cens. For.* 1. 4. 37. 8].

Of innkeepers and boarding house keepers.

Innkeepers and owners of boarding houses have this right, for the board and lodging they provide, over the goods and chattels of the boarders. They can retain as many of the goods and chattels of the boarders as shall be sufficient to satisfy the claim in full. And, therefore says Van Leeuwen, it has become a fixed rule by usage and custom that keepers of taverns and wine and beer

shops, on failure of people to pay for the drink consumed on the premises, may of their own accord seize articles of clothing and attire, swords, and hats or anything else of a similar nature, and keep them until the price of the drink has been paid [*Cens. For.* 1. 4. 37. 9].

Tailors can retain clothes though made of materials belonging to another, until they have obtained satisfaction for their charges [*Cens. For.* 1. 4. 37. 10]. Of tailors.

Advocates and attornies may, in the absence of agreement, retain deeds and documents of clients, which have come into their possession in the course of employment as such until they are paid their fees, unless it is to the interest of the State that the deeds should be produced [*Cens. For.* 1. 4. 37. 11]. Of advocates and attornies.

It is, however, to be observed that, notwithstanding this right of retention, the court may in its discretion order the restoration to the owner of things retained on his giving proper security therefor. This may especially be done to relieve the owner against being deprived of the use of his property during protracted and doubtful litigation. The property would, however, remain in the hands of the owner subject to a legal hypothec for the debt, if any, due by him to the person who had the right to retain it [*Cens. For.* 1. 4. 37. 13, 14]. Court may allow removal by owner on security.

The points of difference between Retention and Set-off are as follow—Set-off is tantamount to payment, while Retention is of use only so far as to secure the payment of what may be due; and it does not, as in the case of set-off, destroy the action. Retention requires possession or actual detention of the thing, whereas set-off takes place apart from possession, as in the case of a surety who, although he is in possession of nothing, can nevertheless make a set-off of the amount which is due to the person for whom he had become surety. Both particular and fungible things Difference between retention and set-off.

are subject to retention, while set-off only applies to fungible things. Set-off is not effected except of a liquid amount with a liquid amount, while the right of retention may accrue even in respect of an illiquid amount [*Cens. For.* 1. 4. 37. 12].

Conventional mortgages.

A conventional mortgage relates to movable or immovable property. With respect to the pledge or obligation of movable property, in order to render it effectual against not only the debtor himself, but also against third persons, delivery of the thing to the creditor is necessary. This, as explained already, is termed pawn or deposit; and all kinds of movable property may be pledged in this way, except that which is of the nature of pawn or pledge to pawnbrokers [V. d. L. 1. 12. 3; Voet 20. 1. 1].

Pawns or deposits.

As regards professional pawnbrokers in Ceylon, Ordinance No. 8 of 1893 makes provision for the regulation of their business.

The property pledged may be one's own or that of another [Grot. 3. 8. 3].

Duties of pawnee.

The pawnee or receiver of the pledge is bound to return the property delivered to him as soon as his debt has been paid. He must take greater care of it than a mere depositary, and consequently he is liable for the destruction of, or any damage to, the property caused by his negligence, but not if the same is due to accident. Fire and robbery are considered as due to negligence, unless he proves the contrary [Grot. 3. 8. 4; V. d. L. 1. 15. 7].

Pawned goods stolen from pawnee.

If it be shown that the goods pawned were stolen from the pawnee without his fault, he is not liable [2 Lor. 114; 3 Lor. 250].

Fraudulent sale of pawned goods.

Where a person to whom certain jewellery had been lent for use upon a particular occasion, fraudulently pawned it with another, the Supreme Court, finding the Roman Dutch Law applicable to the case uncertain, followed the rule of the English Law, and held that

the lender of the articles was entitled to recover them from the pawnee without paying the debt due upon the pawn [*Saibu v. Samsi*, 9 S. C. C. 123].

Pawnee must give up fruits, &c.

The pawnee must give up the fruits or profits of the property pledged or carry them to account in reduction of the debt, unless otherwise stipulated. It is often stipulated that the creditor shall have the profits of the property pledged as interest on his money. This, as explained already, is called *pactum antichreseos* [Grot. 3. 8. 5; V. d. L. 1. 15. 7].

Where pawnee misuses property pawned.

A pawnee who misuses the property may be sued even before payment of the debt, and compelled to give security for the restoration of the property uninjured at the proper time [Grot. 3. 8. 6].

Where creditor sells pledge.

When the creditor has sold the pledge in default of payment, an action to recover it no longer lies to the debtor, but only on action of account for what it has been sold for, and to pay over the surplus to the debtor [V. d. L. 1. 15. 7].

Pawnee liable for necessary expenses.

The pawnor is liable to the pawnee for reimbursement of the necessary expenses [Grot. 3. 8. 7] and costs and charges for the preservation of the thing pledged [Grot. 3. 8. 7; V. d. L. 1. 15. 7].

An heir is bound by this obligation, even though the property pledged belonged at the time of the pledge not to his predecessor but to himself [Grot. 3. 8. 9].

When pawnor may be sued for indemnification.

The pawnor may be sued for indemnification, if he has pledged the property of another, or property previously pledged to another, or has represented the property as other than it really is, or has by his craft deprived the creditor of the possession of the pawn, or has otherwise acted fraudulently with respect to it [Grot. 3. 8. 8], or if the property pledged, through some intrinsic defect, is not of sufficient value and therefore does not answer the purpose of security [V. d. L. 1. 15. 7].

Encumbered movable property in hands of a third party.

Where movable property has lawfully passed into the hands of a third party, it is free and unencumbered, except in the case where a seller has stipulated for a right of mortgage over property sold by him in case of default of payment. In that case, the seller would, in Rhineland, retain his right even against a third party, and even though such mortgage may have been merely underhand [Grot. 2. 48. 29].

Rights of special mortgagee of movable property to proceeds.

A special mortgagee of movable property cannot prevent the sale of such property in execution of a third party's judgment on an unsecured debt, but he has a right to preferential payment of the mortgage debt out of the proceeds of such sale [*Miller v. Young* Ram. Rep. 1872–1876, 23].

Mortgage of immovables how effected.

With respect to securities on immovable property or on property which is of that nature, such as redeemable and life annuities, obligations entered into before the court of aldermen, bonds, or obligations for the remainder of the purchase money of any houses or lands and the like, the pledging of these is not good, unless the act be done before the court or commissaries, and the government duties thereon of two and half per cent. and the additional tenth be paid [V. d. L. 1. 12. 3].

Conventional mortgage or hypothec is either general or special.

General conventional mortgage.

General conventional mortgage is that which extends over the whole of the mortgagor's property [Grot. 2. 48. 23; Voet 20. 1. 6].

It is only effectual as long as the mortgaged property is in the hands of the mortgagor or his heirs. If it has passed into the hands of a third party the mortgage will be ineffectual, if the possessor acquired the property for valuable consideration [*titulo oneroso*]. If he acquired it under a lucrative title, the property will remain subject to the general mortgage [Grot. 2. 48. 24].

General mortgage invalid.

In Ceylon, no general convention mortgage is valid or effectual so as to give the mortgagee any lien, charge, claim, or priority over or in respect of any property movable or immovable [Ord. No. 8 of 1871, sect. 1].

Special mortgage of movables

Special mortgage extends over movable as well as immovable property [Grot. 2. 48. 25]; but a special mortgage of movables need not be so precise as that of immovables. A special mortgage may be effected by such a general description of the property as "stock in trade" [Vand. D. C. 103; *Casie Lebbe v. Aydroos*, 9 S. C. C. 109].

At Amsterdam a prior general mortgage was not prejudiced by a later special one, and a general mortgage was not lost by sale of the property, but the property went burdened with it [Grot. Tr. Maas. 285, n.].

Pledges and sales of movable property how effected.

In Ceylon, no pledge or conventional hypothecation or bill of sale of any movable property is valid and effectual so as to give the pledgee, mortgagee, or transferee any lien, charge, claim, or right or priority over, to, or in respect of such property, unless it has been actually delivered over into the custody and possession of the pledgee, mortgagee, or transferee, or some person on his behalf, and remain ostensibly and *boná fide* in such possession, or unless the pledge, hypothecation, or sale is in writing signed by the person effecting the same or some one lawfully authorised by him, and unless the writing is, within fourteen days, exclusive of Sundays and public holidays, registered in the office of the registrar of lands for the district in which the property is at the time of the contract [Ord. No. 8 of 1871, sect. 3].

How period is to be reckoned.

In reckoning this period of fourteen days the day on which the writing was signed should be excluded. The first day begins at 12 o'clock in the night of the day on which it was signed, and unless the writing be registered before the same hour in the night of the following fourteenth day it ceases to have effect [*Re*

Application of Undeappa Chetty for a Mandamus on Registrar of Lands, Negombo, 4 N. L. R. 284]. The Registrar, it has been held, ought to register all writings tendered, of whatever date they may be. He has nothing to with the effect of registration [*Ibid.*].

Priority of the older of two assignments notwithstanding prior registration of later.

In the case of two assignments of movable property of different dates, the older has priority if registered within fourteen days, although the later may bear prior registration [Ram. 1877, 177].

Rights of mortgagee of movables.

Where a person hypothecated certain movable property on a document duly registered under this section, and subsequently sold the same property and delivered the same to the purchaser, it was held that the mortgagee could not follow the property, and make it liable in the hands of the purchaser for his mortgage debt [*Ramen Chetty v. Campbell*, 2 N. L. R. 94].

Entitled to proceeds of sale.

A mortgagee of movables sold in execution against the mortgagor is always entitled to preferential payment out of the proceeds sale, even as against the claim of the execution-creditor for costs of obtaining the judgment under which the sale took place [*Casie Lebbe v. Aydross*, 9 S. C. C. 109 ; *Ramen Chetty v. Hardie*, Wendt 217]. The mortgagee has, however, the right to stop the sale of the things mortgaged under a simple money writ [*Ramen Chetty v. Hardie*, Wendt 217]. If he is not in possession of the property, he cannot maintain a claim to it when seized in execution under an unsecured creditor's writ, or bring an action under section 247 of the Civil Procedure Code upon his claim being disallowed [*Wijewardene v. Maitland*, 3 C. L. R. 7]. After the sale of the property, it is not executable under the mortgagee's writ [*Simeon v. Tampimuttu*, 1 S. C. R. 213 ; *Walleappa v. Saibo*, 9 S. C. C. 127].

Transfers of pledges, &c. of movable property.

No transfer or assignment of any pledge, conventional hypothecation, or bill of sale as aforesaid is valid so as to give the transferee or assignee priority, unless the

transfer or assignment is in writing, and is signed and registered as aforesaid [sect. 3].

If, however, the pledge, hypothecation, bill of sale, transfer, or assignment aforesaid is contained in a duly registered instrument, which also contains a mortgage or assurance of any immovable property or any transfer or assignment of such mortgage or assurance, there need be no separate registration as stated above of the part of the instrument relating to movable property [Ord. No. 21 of 1871, sect. 1].

No pledges, hypothecations, and sales of movable property or transfers or assignments thereof in writing effected before the passing of Ordinance No. 8 of 1871 are valid so as to give priority, unless they are registered within three months from the date of the Ordinance, or are contained in a duly registered instrument affecting immovable property [Ord. No. 8 of 1871, sect. 4].

"Bill of Sale," meaning of.

The expression "Bill of Sale" as used in the Ordinance includes bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of movable property, and also powers of attorney and authorities or licenses to take possession of personal property as security for any debts [sect. 6]; but not marriage settlements and assignments thereof [Ord. No. 21 of 1871, sect. 4].

Exemptions from Ordinance.

The Ordinance does not apply to hypothecations of ships or vessels or of goods in foreign parts or at sea, nor to property represented by bills of lading, dock warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, and authorising or purporting to authorise either by endorsement or by delivery the possessor of such document to transfer or receive goods thereby represented, nor to any shares or interests in the stock, funds, or securities of any

government, or in the capital or property of any incorporated or joint stock company, nor to choses in action, nor to any crops or produce growing or to be grown on any lands or plantations [sect. 7].

Competition between general and special mortgages.

A later special mortgage of immovable property took precedence of an earlier general mortgage, even though the latter had been executed before the same court; but earlier general mortgages ranked before unsecured debts [Grot. 2. 48. 34].

Of several general mortgages the earliest was preferred, and so also of several special mortgages [Grot. 2. 48. 35].

Mortgaged property in hands of third party.

A creditor may proceed against immovable property specially mortgaged to him, even though the mortgagor himself has lost possession of it, and the property has consequently passed into the hands of a third party, and that without being bound first to excuss the debtor or his heirs [Grot. 2. 48. 32].

Hypothecary action [*Actio quasi Serviana*.]

The *Actio quasi Serviana*, also called *hypothecaria* and *utilis Serviana*, and sometimes simply *Serviana*, was an action whereby a creditor followed up the pledges and hypothecs bound to him expressly, tacitly, or by law, when satisfaction was not made to him by the debtor or by those who were in possession of the subjects mortgaged [Voet 20. 4. 1].

Mortgaged property to be discussed before sureties are resorted to.

When security has been given both by lands and sureties, the pledges are to be first discussed, and afterwards the sureties [Voet 20. 4. 3].

Creditor cannot be compelled to divide hypothecary action.

A creditor cannot be compelled to divide the hypothecary action competent to him, and sue a plurality of persons *pro parte*, that is, each for a part. If a single thing has been mortgaged by a deceased, and been adjudicated to one of a number of heirs of the debtor, or been divided in shares among them, or a part of the pledge has been alienated by the debtor or his heirs, the creditor may discuss for the entire debt either the entire thing so assigned to one of the heirs, or the

portion of it which has come to one person by division or alienation. On the other hand, if several things have been specially mortgaged together for one and the same debt, and some of them have been transferred to third parties-possessors by either a lucrative or an onerous title, each possessor of an immovable thing mortgaged may, in the election of the creditor, be sued not merely to the extent of the separate things possessed by him, but *in solidum*, either to pay the whole debt or to give up what he detains [Voet 20. 4. 4].

Where one heir alone satisfies creditor—cession of action.

If one of a number of heirs has, in consequence of the indivisible nature of the pledge held by him alone, satisfied in full a creditor suing by the hypothecary action, a right of action *pro ratâ* against the other heirs should be ceded to him, just as cession of action against other co-sureties for the same debt is made to one of them who is prepared to pay the whole of it. The heir so satisfying the whole debt may even without cession obtain indemnity from the others by the "*actio negotiorum gestorum*" or "*familiæ erciscundæ*" [Voet 20. 4. 5].

Third parties in possession of portions of mortgaged property.

When third parties are in possession of pledges, holding either a share of a thing mortgaged, or one of a number of things mortgaged at the same time for the same debt, and they are compelled to pay the whole of the debt when sued by the hypothecary action, the better opinion is that cession of action against the principal debtors and other possessors of the other pledges or parts of them should be made *pro ratâ* to the persons paying the whole debt as aforesaid [*Ibid.*].

Right of possessor of portion of mortgaged property who has paid whole debt.

One who pays the entire debt does not recover it *in solidum* from other possessors of other things mortgaged, but only *pro ratâ* [Voet 20. 4. 6].

Rights of joint mortgagees of the same thing.

When one and the same thing has been mortgaged to several creditors together [*simul*], *e.g.*, a half share to one and a fourth to another and so on, or even

when no mention has been made whether of the whole or of a half share, each can sue by the hypothecary action for a share only, whether contending among themselves or against third parties-possessors. Such share will be a half if an equal sum was due to each, or will be a rateable proportion if the debts were unequal in amount. If it has been mortgaged to them *singulis in solidum* [*i.e.*, to each with an interest in every part of the whole] each of them may sue a third party-possessor *in solidum*, in virtue of the *jus in solidum* constituted in each. If they disputed among themselves, the maxim *Possidentis meliorem esse conditionem* applied in the case of movables, which followed the rule *Mobilia sequelam non habent.* In immovables, the rule was that a party not in possession had an equal right with a possessor, at least to the extent that each ranked *pro ratâ* on the price realised by the sale [Voet 20. 4. 8].

Where the same thing has been mortgaged severally to each mortgagee.

Grotius says that even if the mortgaged property has been split up or divided, and has passed into several hands, the mortgagee retains his full right over each portion [Grot. 2. 48. 42].

Where mortgaged property is split up, mortgagee retains his right.

Hypothecary actions.

A hypothecary action is not properly constituted unless the mortgagor, if he is alive, is a party, or some person appointed by the court to represent his estate. At the time of the passing of the Civil Procedure Code the law was that the mortgagee was entitled to two actions upon the mortgage bond : a personal action against the mortgagor for the debt, and, secondly, the *actio quasi Serviana*, commonly called an hypothecary action, against the land to have it sold for the purpose of realising the debt; and when the mortgagor was in possession of immovable property, he might bring both the personal and the hypothecary action simultaneously, and join them in one libel. If the property was in the hands of a third person, that is, if, for instance, the mortgagor had sold the land, then the

mortgagee had the choice of suing the debtor by the personal action, or the person in possession of the property by the hypothecary action, and he could sue them in any order he pleased. Section 640 of the Civil Procedure Code, however, intended to alter that procedure. It took away the right of suing a third person in possession of the property by the hypothecary action without joining the mortgagor in it. and provided that in every hypothecary action the mortgagor must be joined as a defendant, whether he is in possession or not of the property mortgaged at the time of the action [*Punchi Kira v. Songu*, 4 N. L. R. 42; 1 Br. 113].

On death of defendant administrator to be appointed.

In a hypothecary action, on the death of the defendant after action brought, the proper procedure to be adopted by the plaintiff is not to obtain the appointment of a legal representative under section 642 of the Civil Procedure Code, but to obtain the appointment of an administrator under chapter 25 of that Code, who should be made defendant in the stead of the original defendant [*De Silva v. Babasinno*, 4 N. L. R. 345].

Matters to be proved in hypothecary action.

In a hypothecary action by a mortgagee against a person claiming the mortgaged property on a title derived from the mortgagor, not merely the mortgagor's ownership of the property at the date of the mortgage, and the execution of, and the consideration for, the mortgage deed, but also the amount of the debt secured by the mortgage remaining unpaid and liable to be levied by sale of the mortgaged premises, were in issue between the parties [*Ahamado v. Luis*, 2 S. C. C. 80].

Where mortgagee is barred from recovering

Where a mortgagee is by any means barred from recovering the debt on his bond from the mortgagor, he cannot obtain a mortgagee's decree against the purchasers claiming under him [*Soysa v. Pusumba*, 1 C. L. R. 93].

Rights of person deriving title from mortgagor subsequently to mortgage.

A person deriving title to mortgaged property from the mortgagor after the date of the mortgage bond is not bound by a decree on the bond against the mortgagor only [*Suriya v. Watu Balaya*, 5 S. C. R. 211; *Gabriel v. Franciscu*, 4. S. C. C. 22; *Barrie v. Pitche*, Wendt 106; *Sinnaih v. Babanis*, Wendt 213; *Thambi v. Ali*, Wendt 293; *Ahamado v. Luis*, 3 S. C. C. 99; *Sinnan v. Nicholas*, 9 S. C. C. 93; *Suppramanian v. Nagenathar*, 7 S. C. C. 105]. But a mortgagee's rights are not affected by an alienation by the mortgagor *pendente lite* [*Per* Clarence, J., in *Leney v. Peries*, 8 S. C. C. 94].

Alienation *pendente lite*.

Action to redeem.

Where plaintiff bought mortgaged land subject to the mortgage, and at the sale in execution of a decree in an action on the mortgage bond by the mortgagee against the mortgagor, the land was bought by defendant who entered into possession, it was held that the plaintiff could not sue the defendant in the ordinary action of ejectment, but his remedy was an action against the defendant to redeem [*Marimuttu v. De Soysa*, 1 C. L. R. 32].

Possession unnecessary to strengthen security.

Whether the creditor is placed in possession of the mortgaged immovable property or not neither increases nor diminishes the strength of the security [Grot. 2. 48. 33].

Competition between tacit and special mortgages.

A tacit mortgage has in every respect the same force as a special one, so that with respect to several tacit mortgages or one or more tacit and one or more special conventional mortgages regard is had to the date of the debt [Grot. 2. 48. 36; V. L. 4. 13. 7].

A person who has delivered materials for the repair of a house, and bestowed his labour on such repair, is preferred to a prior special mortgagee on the ground that the material and labour has been bestowed for the preservation of the property over which the mortgage existed. But if the person entitled to the legal hypothec in such case takes a conventional mortgage, he

will be deemed to have abandoned his hypothec, and must rely on his conventional mortgage which can only rank after another conventional mortgage of prior date [V. L. Kot. Tr. Vol. II., 91, n.].

The liability of guardians is considered as commencing on the day when the guardianship is undertaken or entered upon; and so any hypothec over their property dates from that day [Grot. 2. 48. 37]. Date of liability of property of guardians.

A later mortgagee may tender to one who has the precedence payment of his claim, and thus step into his place by cession of action [Grot. 2. 48. 43]. Payment by later mortgagee of prior mortgage.

Concerning the right of preference which has practically the effect of pledge or mortgage the following points deserve consideration— Right of preference.

(1) When goods belonging to another are found in an insolvent estate, these are reclaimed by the owner without his being concerned in the question of preference. (2) The first preferent claim on the proceeds of the insolvent estate is the judicial costs, including those of curators and others for its administration, &c. (3) The next class of preference are the costs of the funeral, the rent of the house or land, servants' wages for the current year, government and town taxes. (4) With respect to special mortgages made according to the law of the place, the mortgagee is preferent on the proceeds of the sale of the mortgaged property, after the taxes due on it are satisfied and the charges for necessary repairs for the last two or three years which are preferent. Where there are several special mortgages of the same thing, the oldest is preferent. (5) Next to these rank legal and general mortgages, among which *qui prior est tempore potior est jure.* But the prior legal mortgage or that which is induced by operation of law is preferent to a posterior conventional special mortgage. (6) After payment of the preferent claims, if there is a residue, the concurrent or simple contract creditors share this *pro ratâ* [V. d. L. 1. 12. 4].

Judicial costs.

Costs of funeral.

Special mortgages.

Legal and general mortgages.

Simple contract creditors.

Concurrence in proceeds of execution against person.

The right of concurrence, it may here be observed, is a privilege peculiar to the Civil Law. It is not allowed in respect of proceeds of an execution against person [*Findlay v. Miller*, Ram. 1863–1868, 124].

Acquisition of title by mortgagee after mortgage.

If a *pignus* was first bound to a person by one who was not the owner, and then again to another person by the same mortgagor, but subsequently to his having become owner, the first mortgagee has a preferential right, the right of pledge being confirmed to him by the mortgagor's acquisition of the ownership [Voet 20. 4. 31].

Effect of novation on mortgage.

When a novation of the principal debt is made, the bond of pledge also ceases *ipso jure ;* but if the mortgage is renewed at the time of the novation, the creditor continues to rank as first in order of date, "just as though he had succeeded to himself ;" that is to say, in respect of the same amount and the same things as were comprehended in the first obligation, and not so far as the original debt is increased [Voet 20. 4. 32].

Consent of prior mortgagee to, and his fraud in respect of, second mortgage.

The first in date among mortgagees is not preferent in right when the prior mortgagee has consented to the pledge being bound to a subsequent mortgagee, nor when the prior mortgagee has fraudulently concealed his pledge-right from the second creditor [Voet 20. 4. 33].

Creditor must realise mortgage through court.

The effect of a mortgage is not that the creditor may retain the mortgaged property for himself or sell it on his own authority. He may not even stipulate by contract for the right of forfeiture of the ownership in default of payment, but he must after obtaining judgment allow the sale to take place according to legal process, and thus recover what is due to himself [Grot. 2. 48. 41]. The position is stated by Van der Linden thus—When the debt secured by pledge or mortgage becomes due, the creditor is not at liberty to sell the pledge or thing mortgaged without a decree of the court

or a judgment to this effect. For this purpose he must produce to the court an act of willing condemnation on the part of the debtor, if the obligation contains this clause, or in the absence thereof sue the debtor for payment, and conclude that on default thereof the mortgaged property may be declared bound and executable. When this decree is obtained, execution is levied on the mortgaged property with all the formalities attendant upon a judgment *in judicio contradictoria.* With respect to the sale of things given in pledge, such as life rents, annuities, rent charges, &c., deposited with the creditor as security, among which are also included government securities, a judicial decree is also necessary, for although the mortgagee is generally accustomed to insert in the mortgage deed a covenant that in default of payment he shall be entitled to sell, which covenant is lawful, yet it is more prudent in this case, previously to proceeding to a sale, to obtain the authority of the court [V. d. L. 1. 12. 5].

Where one of two co-mortgagees refuses to join in action.

Where the mortgage is in favour of two persons, and one of them refuses to join the other in bringing the action, the latter may sue alone, making [even independently of section 17 of the Civil Procedure Code] his co-creditor a party defendant to the action. In such a case the plaintiff is not bound to restrict himself to the recovery of only half the debt, but might, it is thought, sue for the whole of it, saving all just defences to the mortgagor [*Gunawardene v. Jayesundara*, 1 C. L. R. 85].

Mortgagee entitled to discuss mortgaged property first.

Cannot be restricted to discuss any particular part first.

A mortgagee who obtains the usual mortgage decree is entitled to discuss the mortgaged property before any other property of his debtor, although such other property be surrendered to satisfy the decree [*Mohideen v. Naina*, 8 S. C. C. 153]. He cannot, however, be restricted to discuss any particular part of the mortgaged property before the other [*Goonesekere v. De Silva*, 1 S. C R. 195]. He is not bound to stand

May have recourse to other property.

or fall by his security. He may have recourse against the other property of his debtor for any deficiency [*The King v. De Bedier*, Ram. 1820-1823, 155]. He is not bound to receive a portion of the debt, and release a part of the mortgaged property [Gren. Pt. III., 21].

Not bound to release portion of property.

Property sold subject to mortgage.

Where the mortgaged property is sold subject to the mortgage, the mortgagee has no right of recourse to the proceeds of sale [*Ludovici v. Perera*, 1 S. C. C. 22].

Action on mortgage against insolvent.

A mortgagee has no right of action upon his mortgage bond against the assignee of his insolvent mortgagor, unless the assignee has entered upon and is in the actual possession of the mortgaged property; and where the assignee has not so entered into possession, the proper course for the mortgagee is to sue the insolvent, and to join the assignee as a party to the suit in order to bind him by any judgment which the mortgagee may obtain [*Muttiah v. Meera Lebbe*, 6 S. C. C. 83: *Karthan Chetty v. Packir Bawa*, 8 S. C. C. 11].

Effect of judicial sale and assertion of right to proceeds.

Where at a judicial sale of the mortgaged property the mortgagee asserts his right to priority, and is allowed such right, his right to follow the property mortgaged is determined [Vand. D. C. 243].

How right of pledge or mortgage ceases.

The right of pledge or mortgage ceases (1) when the debt which founds the obligation is discharged by payment, revocation, or accepting another security, compensation, or set-off, release of the debt, merger, or the like; (2) by consent of the mortgagee, whether express or tacit, as when he consents to the alienation of the mortgaged property by the mortgagor, or to its being mortgaged to another without reservation of his right; (3) by destruction of the property; (4) by release of the thing mortgaged, the debt then remaining only as a concurrent and simple contract or unprivileged debt; (5) by the expiration of the time, if any time had been agreed upon in the mortgage; (6) by prescription of thirty years, if the property is in the hands

of a third party, or of forty years if it is in the hands of the debtor or his heirs, provided no interest has been paid in the meantime to repel prescription [Grot. 2. 48. 44; V. d. L. 1. 12. 6].

Debtor may be prevented from destroying a mortgaged house.

It is not open to the debtor to destroy a mortgaged house without the consent of the creditor, or to alter the form of a thing mortgaged, when such destruction or alteration would make the creditor's position worse in respect of the pledge and its prosecution; and therefore the creditor may interfere to prevent this being done, or, if it has already been done, may sue for the *id quod interest* [damages] [Voet 20. 6. 14].

Accident to property pledged.

If a creditor alleges that the pledge cannot be restored on account of accident, he must prove the accident and that he has used proper diligence. If, however, the accident be of an extraordinary nature, and has been occasioned by extrinsic violence, he is *primâ facie* presumed to have used proper diligence [V. d. K. 540].

Mortgagee giving back deeds.

Where a mortgagee gave back the title deeds to his mortgagor, and the mortgagor's widow purported to sell the land mortgaged to a third person for valuable consideration, and eleven years thereafter the mortgagee asserted a right to the land as against the purchaser who was in possession, it was held that the mortgagee was not entitled to prevail over the purchaser [*Hendrick v. Tyoni*, 3. S. C. C. 105].

Purchase of mortgaged property by mortgagee.

A mortgage debt is not necessarily extinguished by reason of the purchase of the mortgaged property by the mortgagee when sold in execution of a judgment obtained against the mortgagor by a third party [*Basnaike Nileme v. Upendara*, 3 S. C. C. 106; Ram. 1877, 316; *Morgan v. Wijegunetilleke*, Wendt 324]; but where the mortgagee tacitly acquiesces in the sale of the mortgaged property, he is bound by the sale [Vand. D. C. 261].

Acquiescence of mortgagee in sale of mortgaged property.

A *pignus*, says Voet, ceases while the debt remains, when the debtor has sold, bartered, gifted, granted in

dowry or in any other way alienated the mortgaged property to a third party with the consent of the creditor, unless he gave his consent saving his right of pledge, or suffered a sale to take place on the terms that his right of pledge should not cease until he had been paid out of the price realised by the sale of the thing. Nor does it matter whether the creditor has consented expressly or tacitly, provided he has not been manifestly deceived. The ratification of a sale by the creditor after it has been made by the debtor will stand for consent. The mere coincidence of knowledge with silence on the part of the creditor does not imply consent to the alienation, for he is rather to be considered as having permitted the thing to be sold, because he knew that the pledge would remain bound to him everywhere, unless a creditor after having been noticed by public proclamation and being present [that is, not absent from the jurisdiction] when the mortgaged land was solemnly sold by public auction had not then asserted his right [Voet 20. 6. 6].

Procedure under the Code to obtain a mortgage decree binding on all puisne incumbrancers.

Under the Civil Procedure Code when a mortgagee registers his mortgage, and furnishes an address to the registrar of lands, he may by suing the mortgagor only on his bond obtain a mortgage decree binding on all grantees, mortgagees, lessees, and other incumbrancers whose deed of conveyance, mortgage, lease, or other incumbrance is of date subsequent to the mortgagee, unless he has received, previous to the bringing of the action, notice in writing from these puisne incumbrancers that they have duly registered their deeds, and they have further furnished him with an address for the service of the notice hereinafter referred to [sects. 644 and 643].

A mortgagee who receives notice as aforesaid from any puisne incumbrancer must himself furnish such incumbrancer with his [the mortgagee's] address [sect. 644].

On the issue of the summons in the action on the mortgage bond the mortgagee [or person appointed to represent him under section 642 of the Civil Procedure Code] should serve notice thereof in writing, to which a copy of the summons should be annexed, to all such puisne incumbrancers as aforesaid who have given him notice and furnished him with an address as aforesaid [sect. 643]. Any puisne incumbrancer so noticed may on the day fixed in the summons for the defendant to appear and answer apply under the provisions of section 18 to be joined as a defendant in the action. A puisne incumbrancer not so applying, or whose deed is not duly registered, or who has omitted to furnish the mortgagee with an address as aforesaid, will be bound by the judgment in the action in all respects as fully as though he was a party thereto [sect. 644].

The address to be given by a puisne incumbrancer to the original mortgagee must be the same as that furnished by him to the registrar of lands for the district in which the property is situate. The notice to be given by him to the original mortgagee and the notice of action to be served on him may be sent by post, and the production of a receipt for the registered cover under which it is sent is sufficient proof that it was so sent. Every registrar of lands should keep a separate book in a form to be prescribed by the Registrar-General in which the addresses for the service of these notices are to be entered [sect. 643].

CHAPTER V.

Possession [Interdicts].

Definition.

Possession is the actual retention or physical occupation of a thing with the intention of keeping it for oneself and not for another. Both these parts of the definition are necessary to constitute possession. Simple possession without this intention is insufficient.

Lessee is not possessor.

Hence, a lessee, borrower, or depositary cannot be said to possess, nor an attorney or agent or a person to whom anything is committed in charge. Nor does the mere object or design to possess anything without actual detention thereof create the right of possession [Grot. 2. 2. 2, 3; V. d. L. 1. 13. 1]. Van der Linden adds—"Both these requisites must fail before we can be said to have lost possession," but this statement would appear to be inconsistent with the requirement of the presence of both these conditions to constitute possession.

Possession is either *naturalis* or *civilis.*

Possession is distinguished by the Civil Law as *naturalis* or *civilis.* A person is said to have the "*possessio naturalis, qui rem sibi tenet, sed alio jure quam dominii aut nullo jure.*" Thus the person who holds property by way of pledge, or *ex deposito*, or *ex mandato*, is said to hold it *alio jure quam dominii*, whilst those who hold it by a title which the law prohibits, or who have acquired it by violence, possess *nullo jure.* Hence the possession of the former is again distinguished as *justa* and *injusta.* The *possessio civilis* is defined to be *dententio animo domini.* When it proceeds *ex aliqua justa causa*, that is, from some cause or title on which the *dominium* is usually transferred, as sale, donation, devise, descent, &c., it is said to be *possessio civilis justa;* but if the

person to whom property was sold enters upon it before it is delivered to him, he is said to possess it *ex injusta causa* [3 B. 4].

By whom possession can be acquired.

Possession is acquired by those who are sufficiently *compotes mentis* to be capable of entertaining the purpose or design of possessing, and if they are not so, it may be acquired for them and on their behalf by others, as in the case of infants or insane persons by their guardians or curators. It may be acquired by an agent for his principal without the knowledge of the latter, unless, indeed, the agent declares that he has acquired it for himself, and not for his principal [3 B. 5].

It is not necessary that there should be a corporeal taking of each part of the particular subject. Thus, possession taken of a part of a farm, with the intention of taking possession of the whole, is considered as possession of the whole. The intention to take possession must be accompanied by the actual corporeal possession itself [*Ibid.*].

Possession of incorporeal things.

There is only a *quasi* possession of incorporeal things, as usufructs and servitudes, of which possession is acquired by enjoyment and sufferance. The possession of real or personal actions is acquired by cession [Voet 42. 2. 11].

How possession may be retained or continued.

The possession may be retained *animo*, although *non-corpore*. It may continue in law although not in fact. Thus, if during the absence of the possessor, or of his tenant or agent, a third person should secretly enter on the property, the former will not be considered to have ceased to hold possession, until after he has become aware of the adverse possession, and being apprehensive of the violence he might encounter does not return [3 B. 6].

Right by which possession is assumed cannot be changed by possessor's own act.

Neminem sibi ipsum causam possessionis mutare posse is a maxim of the civil law; that is, a person having possession of property by one right or title cannot, by his own act and without the intervention of

some new title, change the character or title by which he holds it [*Ibid.*].

Possession may be acquired through an agent.

Possession and all its consequences, says Grotius, may be acquired through an agent, and may be preserved by intention alone so long as no other person has taken physical occupation of the thing [Grot. 2. 2. 4] Ownership resulting from possession may be acquired through an agent [Grot. 3. 1. 36].

Possession in corporeal as well as incorporeal things.

Strictly speaking, possession can only obtain with respect to corporeal things, but the law has introduced a possession in incorporeal things also, such as estates, easements, and servitudes [Grot. 2. 2. 5].

Every man entitled to retain what he possesses.

Person dispossessed must be restored to possession before his title is gone into.

Every man is entitled to retain whatever he has in his possession, to resist whoever attempts to deprive him of it, and to continue in such possession until another person has judicially established his ownership in the thing [Grot. 2. 2. 6]. No one without a previous judgment or decree may be dispossessed, and were he to be dispossessed on the ground of right in another he must first be restored to the possession before his title can be gone into [V. d. L. 1. 13. 2] *Spoliatus ante omnia est restituendus.* Possession thus exempts from the necessity of proving ownership [Grot. 2. 2. 7].

Possessor before completion of period of prescription has right against all but owner.

Pending the completion of the period of prescription, the possessor has no right as against the owner, but as against third parties he has as much right as if he has already acquired the ownership by prescription [Grot. 2. 7. 2].

The right of possession has nothing in common with that of property, which always requires a lawful title for its acquisition which is not necessary for possession. Possession is therefore of two kinds, possession *bonâ fide* and possession *malâ fide* [V. d. L. 1. 13. 2].

Possession *bonâ fide.*

Possession *bonæ fidei* is where the possessor is evidently under the impression that he has some ownership in the thing possessed. Possession *malæ*

fidei is where he is not under that impression [Grot. 2. 2. 10, 11].

Possession *malâ fide.*

How possession is lost.

Possession is lost by death, so that it is not considered to pass to the heir, unless physical occupation follows; also by renunciation, or the intention of ceasing to possess; and lastly by another person taking physical occupation of the thing, so that one ceases to have any command over it [Grot. 2. 2. 12].

Remedies.

Under the head of possession there are different remedies or modes of proceeding. (1) The proceeding to obtain possession is termed a mandament, or writ of immission [*mandament van immissie*], which is scarcely ever used, except in the case when one co-heir is ousted of his possession by another. (2) The proceeding to retain quiet possession against all those who seek to disturb us therein. This is termed a *mandament van maintenue.* To found this writ, a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice, is necessary on the part of the applicant. (3) To recover possession when lost by the *mandament van complainte.* For this remedy a quiet and undisturbed possession of more than a year and a day is required; and further, that we have been dispossessed within a year before the application. With respect to those who have been dispossessed by force, a remedy is given by the common law, adopted by the Dutch, termed a *mandament van spolie* [V. d. L. 1. 13. 3].

Reconvention in possessory suit.

Reconvention is not allowed in a possessory suit [interdict *unde vi*], although it is in the case of interdicts *quorum bonorum* for obtaining [not recovering] possession [Voet 5. 1. 87].

Possessory cases under Ordinance No. 22 of 1871.

Under Ordinance No. 22 of 1871 [sect. 4] any person who has been dispossessed of any immovable property otherwise than by process of law may institute proceedings against the person dispossessing him at any time within one year of such dispossession. On proof of such

dispossession within one year before action brought, the plaintiff will be entitled to a decree against the defendant for the restoration of such possession without proof of title. This provision, however, does not affect the other requirements of the law as regards possessory suits.

Possession of predecessor in title may be reckoned.

In a possessory action the plaintiff may take advantage of the possession of his predecessor in title in reckoning the period of a year and a day. It is not necessary that he himself should have had possession for a year and a day [*Fernando v. Perera*, 4 N. L. R. 195 ; *Goonewardene v. Perera*, 5 N. L. R. 320].

Title no defence Plaintiff may recover damages.

Title, as already observed, is no defence to a possessory suit [Ram. 1860–1862, 22 and 195], and the plaintiff is entitled to damages occasioned by the ouster [Voet 43. 16. 6].

Claim for restoration of right of way.

It may here be mentioned that when a person establishes that he has used a way as of right openly and continuously for a long period, and is forcibly prevented from further using it, he is entitled to an injunction to have the *quasi* possession of the way restored to him irrespective of whether or not he can establish the existence of a servitude [*Perera v. Gunetileke*, 4 N. L. R. 181].

Can a co-owner maintain a possessory suit?

The question whether a co-owner can maintain a possessory suit is involved in some doubt and difficulty. In *Romel v. Moises* [4 N. L. R. 225] it was held that a possessory action was inappropriate where the defendant was admittedly a co-owner, and that if co-owners could not agree as to the exercise of their common rights, the only appropriate remedy was an action for partition, and in *Perera v. Fernando* [1 S. C. R. 329] the Collective Court thought that the possession of a co-owner was not such an exclusive possession as entitled him to a possessory action in the event of his being dispossessed. On the other hand, it was held in *Casie Lebbe v. Baba* [7 S. C. C. 97] that one of several

part owners of immovable property was entitled to institute a possessory suit against a trespasser who was not entitled to any share of the land; and in the latest case on the subject, *Silva v. Sinno Appu* [7 N.L.R. 5], the Supreme Court was of opinion that the owner of an undivided share of land could maintain a possessory action in respect of such share, provided he joined the other co-owners as parties either plaintiff or defendant.

These two decisions would appear to be somewhat inconsistent with the position laid down by Withers, J., in *Perera v. Fernando* [1 S. C. R. 329], namely, that to entitle a person to maintain a possessory suit his possession should have been a possession *corpore et animo.*

Possession must be *ut dominus.*

The possession of the plaintiff must be a possession *ut dominus.* In *McCarogher v. Baker* [Wendt 253] the facts showed that the plaintiff possessed merely as an agent, and it was held that he was not entitled to a possessory decree in his favour. In *Alim Saibo v. Cadersa Lebbe* [9 S. C. C. 4] the plaintiff for many years had officiated as priest of a Mohammedan mosque, had received the contributions of the congregation, had administered the funds of the mosque, had entered into contracts on behalf of the congregation, and generally had the charge of the affairs of the mosque as the religious head thereof. The mosque itself was a place devoted to religious purposes, and open at all times to Mohammedans for the purpose of worship and other religious exercises. The court held that the plaintiff's possession of the mosque and premises was not a possession *ut dominus*, but a possession on behalf of the congregation, and he could not therefore maintain a possessory action in respect of that property. But in *Changarapilai v. Chelliah* [5 N. L. R. 270; 2 Br. 383] in which the older cases on the subject, especially those of *Ahamado Lebbe v. Semberem* [3 Lor. 28], *Mascoreen v. Ganys* [Ram. 1862, 195], and *Tissera v.*

Costa [8 S. C. C. 193] were cited and commented upon, it was held that if the manager of a Hindu temple had the control of the fabric of the temple and of the property belonging to it, his possession is such as would entitle him to maintain a possessory suit. In the course of his judgment Bonser, C.J., observed as follows

Observations of Bonser, C.J., on the subject.

—"The only point argued before us was as to the competency of the plaintiff to maintain the action. It was urged that whatever his duties and rights were, and whatever his powers were, he did not claim to be the owner of the property *ut dominus*, and that therefore he could not maintain this action. Now, we think that this is too narrow a view to take of the requirements of a possessory action. The remedy given by such an action is a most beneficial one, and it seems to me that the court should not seek to narrow its operation, but rather to enlarge it, if it can do so consistently with principle. No doubt in an ordinary case the person who seeks to maintain such an action must be a person who claims a beneficial interest in the property, and it was laid down by Voet that persons such as tenants of houses, *coloni*, agents, and bailiffs had not such an interest in the property as entitled them to maintain the action. But even that rule was subject to exceptions in the case of absent owners whose agents and bailiffs were allowed to maintain an action for the purpose of protecting their masters' property. Otherwise, irreparable damage might be done, and the right of restoration to possession be lost owing to the absence of the owner. In the case of property belonging to churches and religious bodies, it is distinctly laid down in Voet 6. 1. 29 that persons whom he calls *economi* and other like officers can recover property belonging to churches or religious institutions by an action *rei vindicatio*, and if that is so, it follows a *futiori* that they can recover it by the lesser remedy of a possessory action. As far back as

1858 it was decided by this court that the Mohideen or principal manager or trustee of a mosque who had the management in trust of the mosque was entitled to maintain an action against those who turned him out of possession. That case is reported in 3 Lor. 28. There is, indeed, a later case of 1889, where my predecessor and Mr. Justices Dias held that the officiating high priest of a mosque was not entitled to maintain a possessory action, but it seems to me that that case was decided on too narrow a ground. It may have been rightly decided upon the facts, but the court held the broad proposition that, inasmuch as the priest's possession was not avowedly *ut dominus* [because he claimed that he had possession on behalf of the mosque and the congregation of the mosque], therefore it followed as a matter of course that his action was not maintainable. But that judgment is inconsistent with the judgment to which I have referred, but which was not then cited, and is not supported by the Roman-Dutch authorities which we have been able to consult. It seems to me that each case must depend upon its own facts. The only case which was cited apparently to the court in that last case was the case of *Tissera v. Costa* reported in 8 S. C. C. 193, where it was held that a person called the *muppu* of a Roman Catholic church was not entitled to maintain an action. It seems to me that that case was rightly decided on the facts. The *muppu*, who appears to be a kind of beadle, has no control over the fabric of the church, and is only a caretaker entrusted with the custody of certain movables, a very subordinate servant whose duty it was to keep the church clean, but who had no sort or kind of possession either on behalf of himself or anybody else. In the present case it seems to me that if the plaintiff, who is called the manager of the temple, has the control of the fabric of the temple and of the property belonging to it, he has such possession as would entitle him to

maintain an action, even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only a trustee for the congregation who worship there."

Can a lessee maintain a possessory action against his lessor?

The question whether a lessee has the right to bring a possessory suit, under the law in force in this colony, against the lessor on being forcibly dispossessed by the latter during the continuance of the term, was raised in the case of *Perera v. Sobana* [6 S. C. C. 61]; and Burnside, C.J., in an elaborate judgment, a large part of which was devoted to showing that a lessee or sub-lessee of a farm for a term of years did not occupy the same position towards the land leased that the *colonus* held under the old Roman law, answered the question in the affirmative.

But it must be remembered that the very foundation of such an action is possession, that is *possessio civilis*, and the question is whether a lessee can be said to have such possession. Kotze, late Chief Justice of the Transvaal, in his translation of Van Leeuwen's Commentaries [Vol. 2, p. 112, note] says he has not, and Grotius, in the passage cited in the early part of this chapter, and Van der Linden [1. 13. 1] are apparently not referring to a *colonus* or *inquilinus* of the old Roman times, but to the *conductor* of a later day when they say that a "lessee" cannot in a legal sense be said to possess the thing leased, possession being occupation either in person or by agent with the intention of holding the land as owner. [*Per* Bonser, C.J., in *Maduwanwala v. Eknelligodde*, 3 N. L. R. 213; Grot. 2. 2. 2, 3; V. d. L. 1. 13. 1]. A lessee who is ousted by his lessor from the land leased may have his remedy on the contract of lease to be replaced on the land; but whether he can bring a possessory action against the lessor on the strength of his so-called possession would appear to be, to say the least, somewhat doubtful. Both the lessor and lessee cannot be said to possess the same

property at the same time. If the lessee is in "possession" [using, of course, the term in its technical sense] the lessor is not, and a question would in that case arise whether a lessor who seeks to establish a prescriptive title to the land leased as against a stranger can be permitted to calculate the lessee's "possession" as his own. [See observations on the question of a lessee's right to maintain an action *rei vindicatio*, p. 202 *ante*].

It was at one time thought that an ouster *vi et armis* was necessary to maintain a possessory suit. That may be so under the Roman-Dutch law, but it must be remembered that the ordinance requires no more than a dispossession "otherwise than by process of law."

BOOK II.

JURA AD REM VEL IN PERSONAM.

Personal rights.

The rights to a thing or personal rights vary according to the extent of the cause or origin of the obligation from which they arise. They may be reduced to four—(1) Those which arise from contracts; (2) from *quasi* contracts; (3) from crimes; (4) from *quasi* crimes.

CHAPTER I.

OBLIGATIONS (GENERALLY).

Definition.

An obligation is an act of one man from which a personal claim results in favour of another [Grot. 3. 1. 24]. The right involved is one which entitles one party to compel by law the other party to the fulfilment of the obligation, since imperfect obligations, such as those of love, gratitude, and the like, belong to morals and ethics, and are not within the province of municipal law [V. d. L. 1. 14. 1].

Pothier's definition.

Imperfect and perfect obligations.

The term, Obligation, says Pothier, has two significations. In its more extensive signification it is synonymous with Duty and comprises imperfect as well as perfect obligations. Those obligations are called imperfect, for which we are accountable to God only, and of which no person has a right to require the performance. Such are the duties of charity and gratitude. The term Obligation in a more proper and confined sense comprises only perfect obligations which are also called personal engagements, and which give the person with whom they are contracted a right to demand their performance. Jurists define such

an obligation or personal engagement as a legal tie which binds us to another, either to give him something or to do or abstain from doing some act. This legal tie [*vinculum juris*] is only applicable to civil obligations [Poth. Pre. Art.].

It is of the essence of an obligation that there should be (1) a cause from which the obligation proceeds, (2) persons between whom it is contracted, (3) something which is the object of it. The causes of obligations are (1) contracts, (2) engagements in the nature of contracts [*quasi* contracts], (3) injuries [delicts], (4) acts in the nature of injuries [*quasi* delicts]. Sometimes obligations result from the mere authority of the law, or the mere force of natural equity [Poth. 1. 1; V. d. L. 1. 14. 1]. Requisites of obligations.

Contract may be defined as an agreement by which two parties reciprocally promise and engage, or one of them simply promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act. The words, "promise" and "engage," are used because those promises alone which are made with the intention of producing an engagement, and of giving the party to whom they are made a right of demanding their performance, can amount to a contract and agreement. There are other promises made with fairness and a real design of accomplishing them, but without any intention of giving the person to whom they are made a right of demanding their performance. This is the case when a person makes a promise intimating, at the same time, that he does not mean to engage himself; or when such a reservation can be implied from the circumstances of the case, or the relative characters of the person making the promise and the person to whom it is made. These promises produce an imperfect obligation for their performance, if nothing unforeseen occurs which would have prevented their being made; but still, they Contracts.

do not constitute any engagement, nor consequently any contract [Poth. 1. 1. 1. 1. 1].

A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. A Pollicitation is a promise not yet accepted by the person to whom it is made.

Pollicitation.

A Pollicitation, according to the rules of mere natural law, does not produce what can be properly called an obligation, and the person who has made the promise may retract it at any time before it is accepted. Inasmuch as I cannot by the mere act of my own mind transfer to another a right in my goods without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right [Poth. 1. 1. 1. 1. 2].

Rights of one who is obliged to pay another's debt.

Promise and acceptance are in some cases implied. It is, for instance, a principle of English law that where one, who is only secondarily liable, discharges under compulsion of law an obligation for which another person is primarily liable, he may recover against that person. The debt here must be paid under legal compulsion. A mere voluntary courtesy will not induce a liability [*Lamplugh v. Braitwaite*, 1. Sm. L. C. 136]. It is not enough to make the debtor liable that he has merely received benefit from the payment [*Falcke v. Scottish Imp. Assurance Co.*, 34 Ch. D. 234]. In Dutch law payment of another's debt would not precisely correspond to *negotiorum gestio* [as to which see Part III., Bk. II., Ch. 1., sect. II. *infra*], as the latter chiefly relates to looking after another's property or business in his absence. The same principles may, however, be applied to each case, and it may be taken as the rule that a person who pays another's debt is entitled to indemnification when the debtor has been benefited by

such payment [Mor. Eng. and R.-D. Law, 211, citing Voet 3. 5. 11; Grot. 3. 36].

A contract, says Voet, is an agreement producing an action "from itself and out of its own nature." In this respect it differs, he says, from a Pact which is an agreement in which there is no cause of obligation *per se* and in its own nature. A Pact differs from a Pollicitation in that the latter is merely the promise of the offering party only [Voet 2. 14. 1]. He explains the nature of pacts and their classification, and proceeds to state that it "is now perfectly well known and everywhere received that from nude pacts entered into with a serious and deliberate mind an action is born equally as from contracts, and herein he controverts the contrary opinion of Van Leeuwen [Voet 2. 14. 9].

Certain contracts to be in writing.

In Ceylon, under Ordinance No. 7 of 1840, certain contracts and dispositions of property are required to be in writing. They will be found dealt with more fully at their proper places. Here, it may be observed, generally, that no promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorised by him or her, is of force or avail in law for any of the following purposes—(1) For charging any person with the debt, default, or miscarriage of another. (2) For pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged. (3) For establishing a partnership where the capital exceeds one thousand rupees. Third parties may, however, sue partners or persons acting as such, and offer in evidence circumstances to prove a partnership existing between such persons, and parol testimony may be given concerning transactions by or the settlement of any account between partners [Ord. No. 7 of 1830, sect. 21]. There is some conflict of authority as to the meaning of the expression "establishing a partnership" in this section. The

Guarantees.

Pledges of movable property.

Partnerships.

Should agreement to prove existence of a partnership be in writing?

question is whether it refers to an agreement whereby the fact of the existence of a partnership, present or past, may be shown, or to an executory contract, that is to say an agreement to induce or bring about a partnership in future. The latter view was taken so early as 1871, when it was held [Vand. D. C. 195] that it was where a person sought to compel another to act as partner that parol evidence was inadmissible under the Ordinance. This was followed in the case of *Bawa v. Mohamado Cassim* [1 C. L. R. 53] and by the Collective Court in the case of *Mendis v. Pieris* [1 C. L. R. 98] where evidence to prove a partnership, already dissolved, was admitted although the capital had exceeded one thousand rupees, and the view has been recently endorsed by the Supreme Court in a case from the District Court of Colombo. On the other hand, in *Weerappa v. Alagappa* [6 S. C. C. 119], *Silva v. Nelson* [1 Br. 75], and *Arunasalam v. Shand* [1 Br. 5] a contrary opinion will be found expressed by the judges. In the case of *Silva v. Nelson* [1 Br. 75] Bonser, C.J., held that although oral evidence could not be given to prove the existence of a partnership with a view to make a person liable for the debts of the partnership or to recover the profits, yet where a plaintiff professing to be a servant of a partnership, entitled as such to a share of the profits, sued the alleged partners for such share, it was open to the defendants, by way of defence to the particular claim of the plaintiff, to prove by oral evidence that, by the agreement between them and the plaintiff, the latter was to bear a share of the losses, although such proof would be tantamount to proof of a partnership with a capital exceeding one thousand rupees.

With respect to contracts, three classes of things, namely, things which are of the essence of the contract, things which are only of the nature of the contract, and things which are merely accidental to it, have to

be distinguished from one another. Things which are of the *essence* of a contract are those without which such contract cannot subsist, and for want of which there is either no contract at all, or a contract of a different kind. For instance, it is of the essence of a contract of sale that there should be a thing sold, and a price for which it is sold. If I sell you a thing which without the knowledge of either of us has ceased to exist, there will be no contract. Also, if I agree to sell you anything for the price given for it by my relation, from whom it has descended to me, and it appears that it had not been sold but given to me, there will be no contract for want of a price. In like manner it is of the essence of contracts of *commodatum*, mandate, and deposit that they shall be gratuitous.

Things which are of the essence of a contract.

Examples.

Things which are of the *nature* of the contract are those which, without being of the essence, form a part of it, though not expressly mentioned, it being of the nature of the contract that they shall be included and understood.

Things which are of the nature of a contract.

They differ from those which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties. They differ from things which are merely accidental to a contract, inasmuch as they form a part of it without being particularly expressed. In the contract of sale, for instance, the obligation of warranty which the seller contracts with the purchaser is of the nature of the contract of sale. The seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract, but as the obligation is of the nature and not of the essence of the contract of sale, the contract of sale may subsist without it, and if it is agreed then the seller is not bound to warrant and defend title, such agreement

Warranty in contract of sale.

will be valid, and the contract will continue a real contract of sale [Poth. 1. 1. 1. 1. 3].

Things which are accidental to a contract.

Those things which are accidental to a contract are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due, the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it without being particularly expressed [Poth. 1. 1. 1. 1, 3].

When contracts are invalid.

All contracts derive their validity from the mutual and free consent of the contracting parties [V. d. L. 1. 14. 2]. Consequently, contracts are invalid and not binding—

Error in contract.

(1) When the parties are in error with respect to the object of the agreement, as when one thinks he is giving a thing as a loan, the other that he is taking it as a gift; or in a substantial and not in an accidental quality of the thing, as when one thinks he is purchasing silver and the article proves to be plated; or in the person with whom we contract, as when we take him for another person [V. d. L. 1. 14. 2].

Error is the greatest defect that can occur in a contract. Agreements can only be formed by the consent of the parties, and there can be no consent when the parties are in an error respecting the object of their agreement. If a person intends to sell me anything, and I intend to receive it by way of loan or gift, there is no sale, loan, or gift. If he intends to sell me a thing for a certain price, and I intend to buy for a less price, there is no sale. In these cases there is no consent.

Error affecting quality of thing.

Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it.

It is otherwise, if the error only affects some accidental quality of the thing ; for instance, if I buy a book on the supposition that it is a work of excellence when in fact it is not [Poth. 1. 1. 1. 3. 1].

Error respecting person with whom contract is made.

As to the question whether an error respecting the person with whom I contract annuls the agreement, such error destroys my consent, and annuls the agreement where the consideration of the person with whom I contract is an ingredient of the contract which I intend to make ; for instance, if I, intending to have a picture taken by a particular artist, make a bargain for such picture with another person whom I mistake for that artist, the bargain is void for want of my consent. If, however, the person actually applied to, and who was ignorant of my mistake, had, in consequence of this erroneous agreement, completed the picture, I should be obliged to take it, and pay him a proper compensation. When the consideration of the person with whom I suppose I am contracting forms no ingredient in the contract, and I should equally have made the contract with any other person, the contract would be valid [Poth. 1. 1. 1. 3. 1].

An error in the motive which induces a party to contract does not affect the agreement and prevent its being valid [Poth. 1. 1. 1. 3. 1].

The cases in which mistake affects contracts are exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement, the law will hold that he has agreed. The circumstances in which it is permitted to invalidate a contract arise in one of three ways—(1) Two parties are brought into contractual relations by the fraud or negligence of a third, inducing one to enter into a transaction which he did not contemplate, or deal with a party unknown or unacceptable to him. (2) One of

two parties allows the other to agree with him in terms, knowing that the other thinks him to be a different person from what he is, or knowing well that he attaches one meaning to the terms, while the other party attaches to them another and different meaning. (3) There are cases of genuine mutual mistake where parties contract for a thing which has ceased to exist, or are in error as to the identity of the subject of contract or of one another. Beyond these the law will not assist people whose judgment leads them astray, unless their judgment was influenced by the fraud or misrepresentation of the other party to the contract [Ans. 134].

Duress and undue influence.

(2) A contract is not binding when the consent of one of the parties has been extorted by undue violence or fear, provided this violence be of such a nature as to be capable of acting upon a man of fair courage, in the determining of which the judge must be guided by the circumstances; for example, a degree of fear which cannot be supposed sufficient to have disturbed or influenced the mind of a man of full age or of a military person may, however, have been quite sufficient to have acted upon a female or an old man [V. d. L. 1. 14. 2].

Fear in consequence of which a contract may be avoided is said to be an alarm or disturbance of mind caused by present or future danger or, at any rate, the dread of some substantial evil. Whatever was done by means of inexorable force was also taken to have been done in consequence of fear [Voet 4. 2. 1].

An action lay under the Roman-Dutch Law against the person who caused the fear and against all possessors whatsoever of the thing lost or parted with through fear, whether they were *bonâ fide* or *malâ fide* possessors. It was given to the heirs of the person intimidated and to his sureties whether they themselves became sureties through fear or whether, their principal being intimidated, they voluntarily intervened for him.

The action lay against the heirs of the wrongdoers to the extent to which they (the heirs) have benefited [Voet 4. 2. 3, 4].

The case of those persons is said to be different who at the time they defend a person suffering aggression accept something from him or render him legally obliged to them; that is to say, where they themselves have not applied the force, but have merely gained a reward for their services. Thus, a promise of marriage is said to be binding when a woman, reasonably terrified by danger of shipwreck or of falling into the hands of the enemy or of robbers, promises a man acting in good faith to become his wife, if by his assistance and aid she escaped the danger [Voet 4. 2. 6].

The intimidation in consequence of which a contract is sought to be avoided must be *contra bonos mores* and not just and legal, such as a magistrate is sometimes authorised to cause. It must further be real not imaginary. Reverential fear is not sufficient, unless made to exceed reasonable bounds [Voet 4. 2. 10, 11].

An act done through fear is not set aside if the person intimidated has subsequently either expressly or tacitly ratified it [Voet 4. 2. 16].

The consent by which agreements are formed, says Pothier, ought to be free. If the consent of any of the contracting parties is extorted by violence, the contract is vicious; but as a consent, though extorted, is still a consent ["*voluntas coacta est voluntas*"], it cannot be said, as in case of error, that there is no contract. There is one, although it is vicious, and the person whose consent is extorted, or his heirs, may procure it to be annulled by letters of rescission [Poth. 1. 1. 1. 3. 1]. If after the violence was at an end, he approved the contract, whether expressly or tacitly, by letting the time allowed for restitution, the vice was purged [*Ibid.*].

Where consent is extorted by violence, steps should be taken to have contract cancelled.

English Law on the subject.

Under the English Law it is not necessary for the person whose consent is obtained by violence to institute any process analogous to "restitution." The force may be used as a defence in any suit founded on the contract. The contract is not absolutely void. The party who has suffered the force may waive the exception by subsequent assent, and the party imposing the force can never allege it as a defence if the contract is insisted upon by the other side [Poth. Tr. Ev. p. 15, n.].

Violence exercised by third party.

Violence exercised against a party to a contract even by a third person without the participation of the other party vitiates the contract. There is, however, one case in which an obligation, though contracted under the impression of fear arising from violence, is notwithstanding valid, that is, when I promise something to a person for coming to my assistance and delivering me from the violence which is exercised against me. If the sum which is promised is excessive, my obligation may be reduced to making a just recompense for the service which has been rendered me [Poth. 1. 1. 1. 3. 2. See Voet 4. 2. 6 cited above].

Nature of violence which vitiates a contract.

The violence which vitiates a contract for want of liberty ought, according to the principles of the Roman Law, to be such as is capable of making an impression upon a person of courage. It is necessary that the party who insists upon his having been forced into a contract should have been intimidated by the apprehension of some serious evil, and it should be an evil which is threatened to take place immediately if the thing is not done which is required. If, however, I foolishly suffer myself to be intimidated by a third person, and the person with whom I contract has no concern in it, the contract would be valid, and I should be left to my action *de dolo* against the person who intimidated me [*Ibid.*].

In considering this question of violence, regard should be had to the age, sex, and condition of the parties; and the violence, it must be remembered, should be an *unjust* violence, *adversus bonos mores*. The exercise of a legal right can never be allowed as a violence of this description. So, a debtor can have no redress against a contract which he enters into with his creditor upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest when he made the contract, provided the creditor had a right to arrest him [Poth. 1. 1. 1. 3. 2. See V. d. L. 1. 14. 2. cited *supra*].

Regard to be had to age, sex, &c., in considering question of violence. Exercise of legal right.

A contract entered into in order to relieve a third person from duress, says Anson, is not voidable on that ground; though a simple contract, the consideration for which was the discharge of a party by the promisee from an illegal imprisonment, would be void for unreality of consideration [Ans. 183].

Contract entered into in order to relieve a third person from duress.

When a party has been induced to contract by the fraud of another, the contract is not absolutely and essentially void, because a consent, though obtained by surprise, is still a consent; but the contract is vicious, and the party surprised may institute a process for its rescission. The term fraud [*dolus*] is applied to every artifice made use of by one person for the purpose of deceiving another [Poth. 1. 1. 1. 3. 2]. In order to impeach the contract, it is necessary that the fraud should be committed by the opposite contracting party, or at least that he should participate in it. If it is committed without his participation, and the party defrauded has not suffered any very serious injury, his engagement is valid, and he has only a right of action against the person guilty of the fraud for the damages sustained in consequence of it [*Ibid.*].

Fraud vitiating contracts.

The person defrauded may, however, assent to the contract, and the opposite party cannot then resist its enforcement [Poth. Ev. Tr., Vol. I., p. 19, n.].

Undue influence in English Equity.

In English Equity Jurisprudence, undue influence is classed under the head of Fraud. It is the unconscientious use of the power arising out of certain circumstances and conditions. When the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable [Ans. 184]. When a man seeks, as an equitable remedy, to escape or avoid a grant or promise made gratuitously or for a very inadequate consideration, what must be shown in addition to this, in order to raise the presumption that Undue Influence has been at work may be considered under three heads—(*a*) If one of the parties is uneducated or inexperienced and the other a person of knowledge and experience, or if he was in urgent need, and was thereby induced to sacrifice future advantage, the burden of proof rests upon the promisee to show that the presumption of undue influence is unfounded. (*b*) Where the party who seeks redress is of full capacity, has been within reach of good advice, and is in no such immediate want as would put him at the mercy of an unscrupulous speculator, the exercise of undue influence will not be assumed, unless certain relations, parental or confidential, are shown to exist between the parties. Then a presumption of influence arises, and can only be rebutted by proof that the donor or promisor had been placed in such a position as enabled him to form an entirely free and unfettered judgment independent altogether of any sort of control. (*c*) Where there are no such relations between the parties as create a presumption of influence, the burden of proof rests on the donor or promisor to show that undue influence was, in fact, exercised. If this can be shown, the courts will give relief [Ans. 185, 186].

Where a relation is constituted between two persons such that one of them has obtained an ascendancy over the mind of the other, and the latter is accustomed to rely and act upon his advice, the former is not entitled to use the influence so obtained to his own advantage. And if he does so use it, the contract or transaction so entered into may be rescinded or avoided by the other party. And for the purpose of estimating the undue influence, the "professor" of a foolish superstition may take equal rank with a respectable clergyman or physician [*Huguenin v. Baseley*, 14 Ves. 273; *Lyon v. Horne*, 37 L. J. Ch. 674; 6 C. R. C. 834].

Purchase by solicitor from client.

For similar reasons a solicitor may not purchase from his client. The disability is grounded on special opportunity of information which the relation affords him; and although the relation of solicitor and client has ceased, the disability continues so long as the reason continues to operate [*Luddy's Trustee v. Peard*, 33 Ch. D. 500; 24 C. R. C. 670].

Influence of father on son.

It has been held in England that where a father who has an estate in possession bargains with his son who has a *spes successionis* for his consent which is necessary for dealing with the property, and purchases the consent for greatly inadequate consideration, the transaction [and consequential conveyance *inter partes*] may be set aside on proof of unfair pressure and advantage taken of ignorance without actual fraud [*Menzies v. Menzies*, 20 Rettie 108; 24 C. R. C. 718].

Deceit

(3) A contract is ineffectual when one of the parties has been drawn into it by deceit on the part of the other. This principle, however, is not extended to cases of trifling damage or prejudice occasioned by the fraud or misrepresentations of one of the parties, and which may be easily repaired by an action for damages. That only which is a manifest violation of good faith is held by the judge to be such a fraud as will justify the rescinding of the contract itself; for example, all

fraudulent or knavish dealings of the one party to induce the other to contract with him, and without which he would not have entered into the agreement [V. d. L. 1. 14. 2].

Fraud and mistake.

Under the English Law also, where a person is induced to sign what purports to be a contract through a mistake or fraud going to the essence of the consent, there is no contract to bind him. And so, if A has been fraudulently induced to make what purports to be a contract with B under the belief that he is contracting with C, there is no valid contract [*Thoroughgood's Case*, 2 Co. Rep. 9 *a*; *Conturier v. Hastie*, 5 H. L. Cas. 674; *Cundy v. Lindsay*, 3 App. Cas. 463; 6 C. R. C. 202].

Fraud of one of the parties.

As a rule, no person is to be allowed to take advantage of his own fraud [Aust. 21].

What constitutes fraud.

As to what constitutes fraud, it has been held that when a person, with a view to influence the conduct of another, wilfully leads him into a false belief, and this other person acts accordingly to his hurt, the act is said to have been induced by fraud; and the former is liable to the latter in damages in an action for deceit. To constitute the fraud it is not essential that the defendant was, or expected to be, benefited by the deceit; but it is essential that he should have been guilty of wilful falsehood, or, at least, reckless disregard of truth in the representation made [*Pasley v. Freeman*, 3 T. R. 51; *Derby v. Peak*, 14 App. Cas. 337; 12 C. R. C. 235].

The term "*dolus*" in its wider sense includes all kinds of unfair dealing [Voet 4. 2. 2]. Fraud, like fear, is never presumed [Voet 9. 2. 20]. It may either be the direct occasion or cause of a contract, or it may only incidentally enter into it. It is said to be the occasion of a contract when a person, not intending to enter into one, is induced to agree to that which he would by no means have done if there had been no fraud. It is considered incidental only when any one contracts voluntarily, but is deceived in some particular of the

contract, as for instance with regard to the price or otherwise [Voet 4. 3. 2, 3]. A transaction induced by fraud may be ratified by the person deceived. The *actio doli* was given to a person injured by another's fraud and to his heirs, unless such person was aware of the fraud practised upon him at the time it was so practised [Voet 4. 3. 8, 9].

The *actio doli.*

This action is not allowed to one fraudulent person against another. Here fraud is rather to be set off against fraud, nor is it allowed to him who by his fraud has deceived the other, nor even to him who subjected indeed to fraud was not ignorant of it. The action lies against the person who employed the fraud, even against a minor, if he was *proximus pubertati* when guilty of it. The action does not lie against heirs except in so far as they have been benefited by the fraud, or have fraudulently done something so as to receive less than they should have done. If several persons have participated in the fraud, the action lies against each individually *in solidum*, with the result, however, that if one pays the others are released. A procurator is liable to this action for fraud committed as procurator, a tutor for fraud as tutor, and in these cases the action is allowed against principals and pupils for the amount to which they have benefited by the fraud [Voet 4. 3. 8, 9].

This action does not lie against third persons who are possessors of the property lost to the person defrauded. In this respect, as already explained, possessors of property of which one is deprived by the inducement of fear are in a different position [Voet 4. 3. 10].

By this action the property lost may be reclaimed and damages recovered [Voet 4. 3. 11].

Van Leeuwen on the action for fraud.

The action for fraud, says Van Leeuwen, is an equitable one, depending on the discretion of the judge, available to the person who has been cheated by

the fraud, its subject being the thing he has lost, and its object the fraudulent person himself or any parties privy to the fraud. The customary formula for this was the Praetor's Edict, drawn in these or similar words—"When anything is alleged to have been done fradulently, if no other action applies, and there seem to be good grounds, I shall grant a judgment on those grounds in favour of the man whose interests have suffered by that act, if he clearly proves that anything has been done fraudulently and against the fraudulent person within a year from the time when the cause of action arose, and judgment will follow unless reinstation be granted by the judge upon the merits" [*Cens. For.* 1. 4. 42. 2]. It is a personal action, and it is not available against heirs except in so far as they have secured any advantage from the fraud. The action is available to secure what has been lost through the fraud, so that it must be restored to its full extent as valued at the discretion of the judge. It is not available for a trifle, nor where there is fraud on the part of both the contracting parties, nor where another remedy remains open [*Cens. For.* 1. 4. 42. 3 *et seq.*].

Customary formula therefor.

When action is available and when not.

When the cause for which an engagement is contracted is false, the engagement is null, and so is the contract which includes it. For instance, if upon the false supposition that I owe you a thousand pounds left you by the will of my father, which has been revoked by a codicil whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null; and if I have given the estate, I am entitled to reclaim it. This right of action was known to the Roman Law as *condictio sine causa* [Poth. 1. 1. 1. 3. 6]. Similarly, when the cause for which an engagement is contracted is repugnant to justice, good faith, or morals, the engagement and the contract containing it are null [*Ibid.*].

Engagement contracted on false supposition.

Condictio sine causa.

Engagement repugnant to justice, good faith, &c.

It is here sometimes necessary to consider whether the cause for which a promise is made is repugnant to justice or morality on the part only of the person to whom it is made, or both on the one side and the other. In the former case a party has the right of recovering what is given in pursuance of the agreement. In the latter, according to better opinion, he has no such right, and the other party, if he has performed his part of the agreement, cannot demand from the former the money he had promised [*Ibid.*]. Thus, if A promise a sum of money to B for committing a crime, A is not obliged to fulfil his promise even after the commission of the crime by B; and if A in execution of the void agreement pays the money agreed upon, he is not entitled to recover it back.

Where lack of morality, &c., applies to one side only.

An agreement giving either party entire liberty to perform it or not, as he may please, is absolutely void for want of obligation; but if I promise to give you something in case I judge it reasonable, there is a real obligation contracted, since it is not altogether left to my choice to give the thing promised to you or not. So, though I promise something under a condition which depends upon my will whether I accomplish it or not, as if I promise to give you a certain sum of money in case I go to Paris, the agreement is valid, and there is on my part an obligation and a real engagement [Poth. 1. 1. 1. 3. 7].

Agreement which either party may perform or not as he pleases.

A contract is not binding and may be cancelled—

(4) When the price we have agreed to pay for a thing enormously exceeds its real value, that is, it exceeds twice the value of the highest price the thing in contract was really worth at the time [V. d. L. 1. 14. 2].

Enormis Læsio.

The right to rescind a voidable contract must be exercised within a reasonable time, and is destroyed when *restitutio in integrum* has become impossible [*Oakes v. Turquand*, L. R. 2 H. L. 325; 6 C. R. C. 879].

Besides the invalidity of contracts on the ground of the want of free and mutual consent, they are also void when they are made without a consideration,* or for a false consideration, or for a consideration which is repugnant to justice, good faith, or good morals [V. d. L. 1. 14. 2].

Consideration.

Where immoral consideration is on only one side.

If the immoral cause is on the side of the acceptor alone, no claim can be made by virtue of the obligation, but any payment made under it having been once made holds good. If the immoral cause is on both sides, the party in actual possession is in the better position [Grot. 3. 1. 43].

A reward promised for the purpose of bringing about a marriage cannot be said to be founded on immoral cause or consideration [V. d. K. 482].

Pacts against freedom of marriage.

Pacts against the freedom of marriage are not allowed by law. A pact between two persons stipulating that whoever marries first must pay the other a certain sum is void ; but a donation, a legacy, or an institution may be made under condition of widowhood [Voet 2. 14. 21].

An agreement for future separation between husband and wife is void [*Cartwright v. Cartwright*, 3 De G. M. G. 982 ; 6 C. R. C. 368].

Contract to commit breach of promise to marry.

A contract between two persons that one should break a promise he has made to marry another is illegal, and cannot be enforced [*Perera v. Anthony*, Ram. 1863–1868, 46].

Jewels and presents given by one person to another in contemplation of a marriage between the two are recoverable from the latter, if he or she refuses to marry the former [*Appuhamy v. Mudalihamy*, Ram. 1863–1868, 226].

Agreement to change religion.

No action lies for breach of an agreement by which a party in consideration of marriage agrees to change his religion [3 Lor. 30].

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* See paragraph on "*Ex nudo pacto*," &c., *infra*.

Past marriage as a consideration.

A future marriage has been held to be a good consideration for a contract, but a past marriage is not [Vand. D. C. 192].

Grantor of bond may sue for cancellation on failure of consideration.

Where the consideration for a promise, *e.g.*, a bond, fails, the promisor or grantor may sue for a cancellation of the contract, and is not bound to wait until he is sued thereon to establish failure of consideration [*Kadija v. Hadjiar*, 5 N. L. R. 146 ; 1 Br. 417].

Consideration of guarantee.

It is essential to the validity of a guarantee that the consideration for it should appear expressly or by necessary implication from its terms [*Sathappen v. Andiappen*, 8 S. C. C. 167].

Where contract is partially void.

Where the consideration for the making of a contract by each signatory to a document is the undertaking in the same document by the other signatories, and parts of the contract are void for impossibility of performance, the whole contract is incapable of supporting a suit [*Kathiritamby v. Mootatamby*, 1 S. C. C. 102].

Consideration on bonds may be impeached.

Bonds in Ceylon executed before a notary and witnesses stand on the same footing as simple contracts in England, and want or failure of consideration thereon may be proved by other evidence. Moreover, by the Roman-Dutch Law, a plaintiff suing within two years of the date of a bond must prove the passing of consideration if it be denied, unless the defendant has renounced the *beneficium non numeratæ pecuniæ* [*Cornelis v. Perera*, Ram. 1843–1855, 161]. The Supreme Court declined to insist upon this requirement of the law as to proof of consideration by the plaintiff in the case of a mortgage bond in *Gibson v. De Bedier* [Ram. 1820–1833, 150]. The mere denial by the defendant that any consideration was received, coupled with the evidence of the attesting witnesses that they did not see any money paid to the defendant when the bond was signed, is not of itself sufficient to justify a court in upholding the plea of failure of consideration [*Narayani v. Kanapathy*, 6 S. C. C. 68].

No evidence admissible to contradict instrument.

Although evidence may be admitted to impeach the consideration of a notarial instrument, no evidence is admissible to contradict the instrument [*De Silva v. De Silva*, 9 S. C. C. 125].

Illegal consideration.

An illegal consideration is insufficient to support a contract. Thus, where the consideration was to withdraw a criminal charge of assault and theft, it was held that the contract was invalid [*Valipulle v. Ponniah*, Wendt 276]. So, where plaintiff sued to recover from the defendant a sum of money paid by him to the defendant on his promise to procure for the plaintiff a place under government which the defendant failed to fulfil, it was held that the contract was illegal, and the plaintiff being *in pari delicto* with the defendant could not recover [*Sedoepady v. Nicholas*, Ram. 1843–1855, 113]. It is illegal under the Roman-Dutch Law to bargain for immunity for past offences, and hence a bond of which the consideration is to forebear criminal proceedings against a thief is void [*Ramen Chetty v. Joedt*, Ram. 1863–1868, 197].

Is a nude pact insufficient to support an action?

Most of the decisions cited above have proceeded on the assumption that a nude pact was insufficient to support an action under the Roman-Dutch Law; but whether that assumption is justified by the authorities has not so far been seriously considered in Ceylon. The question appears to have been raised in case No. 33,605, C. R., Negombo [3 S. C. C. 70], but not decided. A learned note on the subject by Mr. Kotze, late Chief Justice of the Transvaal, in his translation of Van Leeuwen's Commentaries may here be cited with advantage—

Does maxim, *Ex nudo pacto non oritur actio*, obtain in Roman-Dutch Law?

"Mr. Decker, in his annotated edition of Van Leeuwen's Commentaries, in note (*a*) to section 1, chapter 2, book IV., says that all voluntary and deliberate engagements, made by competent persons from some *reasonable cause*, must be observed; and he adds that the maxim of the Civil Law—*Ex nudo pacto non oritur*

actio—does not obtain in the Law of Holland. He cites Grotius, Voet, Vinnius, and Van der Marck in support of this view. In the recent case, however, of *Alexander v. Perry* [Buch. Rep. 1874, p. 61] the Supreme Court of the Cape Colony where, in the absence of legislative enactment to the contrary, the Roman-Dutch Law prevails, held by a majority, that a contract not founded on a consideration, could not be enforced by action, *i.e.*, that *ex nudo pacto non oritur actio.* As the doctrine of *undum pactum*, or absence of consideration, has an important bearing on the law of contracts, it may be desirable to examine this decision a little more closely. * * * With the exception of a passage in Van der Keessel [*Th.* 484] the authorities cited by counsel in *Alexander v. Perry* were all text writers on English law. No argument appears to have been addressed to the court on the important question whether by the Roman-Dutch Law, which is the common law of South Africa, a contract without consideration is enforceable by action or not. A careful examination of all the Roman-Dutch authorities will show beyond all doubt that *ex nudo pacto oritur actio.* I will point out below that the English translators of Van der Linden and Van der Keessel, upon whom the learned Chief Justice relied, have not faithfully rendered the language of the original texts. Voet, in his Commentary on the Pandects [2. 14. 9] lays down that a nude pact made deliberately and in earnest is binding, and begets an action by the Law of Holland. This opinion of Voet is approved by the Supreme Court of the Cape of Good Hope in two earlier cases, viz., *Louisa v. Van den Berg* [1 Menz. Rep. 472], where it was held that a gratuitous promise, if accepted, gave a good right of action; and in *Jacobson v. Norton* [2 Menz. Rep. 221], where the same court held that a promise by the defendant to pay a debt due by K required no consideration to support it. These decisions, however, were not referred to either

by counsel or the learned judges in *Alexander v. Perry*. In support of this view that in Dutch practice *ex nudo pacto oritur actio*, Voet cites several authorities, among them Grotius, P. Voet, Groenewegen, and Vinnius. Grotius in his Introduction to Dutch Jurisprudence [3. 1. 52], after observing that the Germans from times of old paid great regard to good faith and did not recognise the subtleties of the Romans with respect to verbal contracts [*stipulationes*], says it has been 'adopted in principle and practice that all promises which result from a *reasonable cause*, in whatsoever terms expressed, confer a right to claim or to reject a claim.' Groenewegen in his useful book *de ll. abrogat.* [Cod. II., tit. 3, *de pactis*] lays it down [1. 10. 1. 13] *Moribus nostris ex nudo pacto non solum exceptionem, sed et actionem competere constat. l. 21. Moribus nostris ex nudo pacto tam actionem, quam exceptionem nasci. l. 28. Non observatur. Quia hodie ex nudo pacto datur actio.* Paul Voet, the father of the illustrious John Voet, in his Commentary on the Institutes [3. 14. 5] says that according to general custom *ex nudo pacto datur actio*, and adds that this maxim does not obtain in Friesland, where the Roman Law is followed. In the passage referred to by Mr. Decker, in his note to section 1 of the text, Vinnius observes it has been long since received in practice that *ex nudo et simplici pacto actio detur*, so that now a pact has the same efficacy as a stipulation, Van Leeuwen indeed states [*Cens. For.* 4. 2. 2] that the rule of the civil law, viz., that a nude pact does not beget an action, is also adopted in Dutch practice. But, as observed by the Chief Justice in *Alexander v. Perry*, Voet has pointed out that Van Leeuwen has here fallen into error by confusing *pacta nuda* with a convention or caution [written agreement] which required the *causa debiti* to be expressed. De Haas, the editor of the *Censura*, adopts and approves this correction by Voet. In another

passage of the *Censura*, however [2. 4. 4], Van Leeuwen admits that by the Law of Holland [*moribus nostris*] an action may arise *ex nudo pacto*. Boel, ad Loen. decis. p. m. 353, also adopts the view of Voet that if the promise be made seriously and deliberately, although it be *nudum pactum*, an action will lie to compel performance. I would also refer to the 32nd observation [*aanmerking*] on the R. V. of Lybrecht's *Notaris Ambt.* p. m. 425, where it is said that a natural obligation or bare convention [*pactum nudum*] contrary to the rule among the Romans binds *civilly* [*i.e.*, legally], if only the convention has been made in earnest. Before considering the passages in Van der Keessel and Van der Linden, relied on by the Supreme Court in *Alexander v. Perry*, we must remember that every contract requires [as Mr. Decker has observed] some reasonable cause. Now, reasonable or valid *cause* is not synonymous with reasonable or valid *consideration* as this latter term is generally understood, but is of wider meaning. *Causa*, cause, or *oorzaak*, denotes the ground, reason, or object of a promise, giving such promise a binding effect in law. * * * *A Stipulatio* which, like a contract under seal at common law, was not founded on any consideration, but derived its binding force from the use of certain solemn words [*spondesne? spondeo*] required, nevertheless, to be based on some *causa* [*Dig.* 44. 4. 1. 2, § 3]. In the same way, Grotius [3. 1. 53] uses *oorzaak* or cause in a much wider sense than the term *consideration* in English Law imports. Mr. Decker, in note (a) *supra*, employs the expression *reasonable cause* as equivalent to physical and moral possibility. By moral possibility is to be understood that the contract must not be *contra legem aut bonos mores* [*cf.* Voet, *Compendium ad Pand. tit. de pactis*], So, in like manner, Pothier observes, 'In contracts of beneficence, the *liberality* which one of the parties intends to exercise towards the other is a

sufficient *cause* for the engagement contracted in his favour [*Evans' Pothier*, p. 1. c. 1, § 6]. A consideration, therefore, is certainly denoted by the term *oorzaak* or *causa;* but these terms are of much wider meaning than the English word *consideration*, for they will comprise the motive [*sensu latiori*] or reason for a promise, and also what is known in English Law as purely moral considerations. It follows that where there is a consideration there is *causa*, but the converse of the proposition is by no means true. Consequently, the translators of Van der Keessel and Van der Linden have erred in rendering *causa* and *oorzaak* into the narrower term *consideration*. Van der Keessel says [Th. 484]—' A promise which is not founded on a just *causa debendi* [*i.e.*, *obligandi*] does not give a right of action, although otherwise an action is maintainable on a *nudum pactum*'; and Van der Linden [1. 4. 3] writes that contracts are null and void whenever they have no cause [*oorzaak*], or have a false cause or a cause which is contrary to justice, good faith, or morals. If by *causa* and *oorzaak* we understand legal *consideration*, as Mr. Henry and Mr. Lorensz have done in their translations, we make Van der Linden and Van der Keessel say what is clearly not law. But the question is effectually set at rest by these writers themselves. In *thesis* 798 Van der Keessel clearly lays down the principle that by the Law of Holland an action can be founded on a nude pact. And Van der Linden, in a note to his translation of Pothier on Obligations [1. 1. 2], after observing that the divisions of contracts among the Romans into *nominate* and *innominate*, *bonæ fidei* and *stricti juris*, are, generally speaking, not recognised in the jurisprudence of Holland, proceeds to say, ' In like manner the rule of the Roman Law, *ex nudo pacto non datur actio* does not exist among us.' The *dicta*, therefore, in *Alexander v. Perry* are contrary to the unanimous opinion of all

the Roman-Dutch authorities, and at variance with the decision in the two earlier cases of *Louisa v. Van den Berg & Jacobson v. Norton.* The feeling of the country may, as put by Fitzpatrick, J., be in favour of requiring a consideration to support a promise; but until the Legislature steps in, and makes the necessary alteration, the judges must administer the existing law, and not alter or mould it" [V. L. Kot. Tr. Vol. II., p. 28 *et seq.*, note].

On this subject Mr. Morice, from whose work we have already quoted, says as follows—"Under Dutch Law, a consideration in the English sense of the word is not an essential of a contract. The nearest approach to anything of the nature is the cause or *causa*, the presence of which is essential to a contract. The *causa* was taken over from Roman Law, and is perhaps the germ of the English doctrine of consideration. The meaning appears clearly from Grotius's expression 'reasonable cause.' There must be a reason for a contract, a rational motive for it, whether that motive is benevolence, friendship, or other proper feeling, or, on the other hand, is of a commercial or business nature. In other words, the agreement must be a deliberate, serious act, not one that is irrational or motiveless. This point of view would appear very similiar to that of English Law in recognising the validity of a contract under seal without consideration. The solemn forms of the deed under seal are assumed to involve deliberation. There has been a tendency to introduce the English doctrine of consideration into the South African colonies, and many regard it as already naturalised in Cape Colony. In *Alexander v. Perry* [Buch. 1874, p. 59] it was held that a consideration was necessary for a contract of service. In *Hansen & Schrader v. Quirk* [5 E. D. C. 35] the Court of the Eastern districts adopted the doctrine of consideration in regard to contracts generally. In the case of *Malan*

& Van der Merwe v. Secretan, Boon & Co. [Foord's Rep. 94] Sir Henry de Villiers approved the decision in *Alexander v. Perry*. These decisions, however binding they may be in Cape Colony, cannot be considered to have established the doctrine in South Africa. The language of the judges suggests that they misunderstood the meaning of the *causa* of the Dutch Law, and failed to appreciate the deficiencies of the English doctrine of considerations. Decisions evidently contrary to the system of law of a country should rest on stronger grounds than are presented in these cases. The Court of the Transvaal, on the other hand, has not adopted this innovation. The doctrine of consideration in a moderate form may be useful for the purposes of an insolvency law. It does not appear desirable to treat it as a necessary element of a contract. The doctrine introduces a technicality, which like other technicalities enlarges the gulf between legal and practical views. It cannot be denied that to the non-legal mind it is an anomaly that a person should not be bound by a deliberate promise made on account of a past debt or service, or on any other reasonable ground, or that an undertaking to keep open an offer for a certain time, generally called a refusal, should involve no legal obligation to do so.

"A further weakness of the doctrine of consideration is the position that, while a consideration is necessary, the adequacy of the consideration will not be inquired into. This allows the consideration to be nominal, and paves the way for evasion of the rule. Lastly, if a consideration is such a vital element in a contract, why should it be unnecessary in the case of a deed under seal? The judges, it may be remarked, who have introduced the English doctrine into South Africa seem to have overlooked the fact that, as will appear from the next section, there is nothing in Dutch Law that legally corresponds to the English deed under seal.

"It may further be noted that though in Cape Colony a contract without consideration may not be enforced, it has been decided in that colony that such a contract may be pleaded as a defence. Thus, in the case of *Malan & Van der Merwe v. Secretan, Boon & Co.* [Foord's Rep. 94] it was held that an agreement without consideration makes a good defence to an action on a contract, to modify which the agreement has been made. This is founded on the analogy of Roman Law which allowed a *nudum pactum* to be pleaded as an *exceptio;* and applies to release from debt without consideration" [Mor. Eng. and R.-D. Law, 72–74].

When a promise may be revoked.

A promise made without reasonable cause, that is, without donation or some other contract, may be revoked [Grot. 3. 30. 12], and so may whatever one has given to another without lawful cause be recovered, for instance, when something is given in contemplation of marriage, and the marriage does not take place [Grot. 3. 30. 15, 16].

Unjust or dishonourable cause of contract.

In the case of anything given for an unjust or otherwise dishonourable cause recovery is allowed when the dishonourable conduct is on the side of the acceptor or on both sides, but not when on the side of the giver [Grot. 3. 30. 17].

Among contracts with dishonourable causes underlying them occur certain agreements with members of certain professions. Thus, an advocate cannot stipulate with his client for a share of the lawsuit, nor can he bargain for fees only on victory.

Advocate cannot stipulate for share of lawsuit.

A legacy or donation may be given to an advocate by his client during the pendency of the suit, unless the transaction savours of extortion by the advocate [Voet 2. 14. 18 and 3. 1. 10, 12].

Advocate may recover fees.

An advocate may, under the Roman-Dutch Law, sue for and recover his fees [1 Thom. 542];

Under the English Law.

but, under the English Law, on grounds of public policy, the recovery of fees payable to a barrister cannot be enforced by action; nor will an action lie on an account stated for such fees, although the service has

been performed, and the debt admitted [*Kennedy v. Broun*, 32 L. J. C. 137; 1 C. R. C. 789; 7 C. R. C. 714].

Receipts of advocate need not be stamped.

Receipts given by counsel for their fees need not be stamped [23 L. J. Ch. 536; 9 L. R. 9 Mad. 140].

Proctor may charge for work though proxy is not filed.

A proctor may charge for work done during the time he held a proxy, although such proxy was not filed of record [*Subasinghe v. Subesinghe*, 3 Br. 69].

Order in which counsel address court.

It may here be observed that when separate counsel appear severally for each of several parties to a case, they would address the court, cross-examine, &c., not according to the order of seniority among themselves, but according to the order of arrangement of their clients [see L. J. 2nd Nov. 1895, p. 61].

Pacts with medical men.

Pacts, if not dishonourable, may be entered into between medical men and their patients. A patient, however, entering into pacts to his prejudice in moments of danger is not bound thereby [Voet 2. 14. 19].

Advocate who gives up his client's case should not support opposite side.

An advocate who after becoming acquainted with his client's case finds it dishonourable and abandons it should not, as a rule, contract to assume the support of the opposite side [Voet 3. 1. 4].

It may here be observed that advocates and attornies at law might recover remuneration even in the absence of a promise, but neither advocates nor attornies could retain documents entrusted to them in the professional capacity for fees except for expenses incurred on such documents, nor have they a right of preference over other creditors [Voet 3. 1. 6. and 3. 3. 1].

Advocate succeeding in his own suit.

Or acting in the first instance *gratis*.

Voet, in opposition to the opinion of Gail and others, thinks that an advocate who advocates his own suit and succeeds therein can recover his fees as such from the defeated party; and where an advocate in the first instance had acted as a friend or relative and intended to charge nothing, his client, if successful, might recover for his benefit from the opposite party the fees that he would otherwise have charged [Voet 3. 1. 7].

On a promise which is not founded on a just *causa debendi* an action cannot be effectually maintained in court; although in other respects an action is maintainable on a *nudum pactum* [V. d. K. 484].

Parties contracting must be capable of binding themselves.

It is essential to all agreements that the parties contracting are capable and entitled in law to bind themselves. Therefore, children, idiots, and lunatics, so long as they remain such, are incapable of contracting, except by the interposition of their guardians and curators [V. d. L. 1. 14. 3]. Obligations incurred by minors are not invalid in so far as they have been benefited, nor are they invalid if incurred through delict [Grot. 3. 1. 26].

Minors.

Minor fraudulently representing himself major.

Restitution is not granted if a person fraudulently represented himself to be a major, or was upon good grounds supposed to be such, unless his opponent knew that he was a minor. Proof of this knowledge lies upon the person seeking restitution [Voet 4. 4. 43]. Minors could not obtain restitution against marriage [Voet 4. 4. 45].

Restitution against marriage.

Young children, lunatics, &c., are not bound by promises.

It is according to natural law that young children not yet possessed of understanding and lunatics and, so far as verbal promises go, the dumb cannot be bound by promise aiming at a contract; and municipal law adds all other minors and prodigals to the category [Grot. 3. 3. 2].

Guardians, &c., must cede claims acquired during management.

Guardians and business managers of merchants may be called upon to cede the personal claims which they have acquired by virtue of their management, and if they refuse to do so, or are unable on account of insolvency, the cession is regarded as actually made [Grot. 3. 1. 38].

Persons in a state of drunkenness cannot contract.

Those who are in such a state of drunkenness as to have entirely lost the use of their reason are incapable for the time of entering into contracts [V. d. L. 1. 14. 3; Poth. 1. 1. 1. 4].

Nor married women

Married women also are incapable of contracting or binding themselves to others without the consent and assistance of their husbands, and prodigals become incapable of contracting so soon as the administration of their property is taken from them by the appointment of curators [V. d. L. 1. 14. 3].

Nor prodigals.

We cannot covenant for third person.

It is also a fundamental rule of law on this head that only that which one of the contracting parties has covenanted for himself, and, on the other hand, only that which the other party has promised for himself or on his part, can be the subject of a contract, since to covenant or undertake for a third person is of no effect, unless this third person confirms it by his consent, and acquires some right thereby. This, however, is not to be extended so far as to prevent my stipulating that, in place of paying the money to me, it should be paid to a third person; or to stipulate that any particular act shall be done for a third person when I myself have a direct interest in it; or to stipulate or engage so as to bind our heirs, or others taking under us; or, lastly, to contract by means of a third person, as by an attorney [V. d. L. 1. 14. 3]. Parents may, however, bind children still in their power, and these may be bound by their parents for the time they continue in their power [Grot. 3. 1. 28].

Parents may bind children.

Promise to pay third party.

Where a person stipulates to accept a promise whereby something is promised to be given to him or to a third party, the promisor has his option as to whom he will pay; but the third party cannot demand payment. In general, no one can acquire a personal claim through another. If the promise was to pay something to the acceptor and a third party, the acceptor will only be entitled to the half [Grot. 3. 3. 37]. Van der Linden does not approve of the doctrine recognised by Groenewegen [ad S. 19. Inst. de inut. stipul.] and Voet [ad tit. ff. de verb. oblig. n. 3.] that, according to our sense of moral obligations, a person can as well promise and

contract for another as for himself [V. d. L. 1. 14. 3. See note 3].

On a promise made to a third party which such third party has accepted without authority, the party really interested would acquire the right, provided he afterwards accept the promise, or if such third party who has assented without authority be a public functionary, such as a notary [V. d. K. 510].

Rules of interpretation of contracts.

In the interpretation of contracts the following rules are to be observed [see V. d. L. 1. 14. 4]—

(1) In the agreement we must follow the general will and intention of the parties in preference to the literal sense of the words. (2) When a clause or covenant is capable of being taken in two senses, it must be construed in that sense which will render it operative rather than that which would render it of no effect. (3) When, in like manner, the words of a contract may be taken in two ways, they must be construed in that way which is most agreeable to the nature of the contract. (4) That which is ambiguous in a contract is to be interpreted by the usage of the place where it is made, or where the subject-matter, if real, is situate. Thus, a covenant to cultivate a farm in a husband-like manner, must be interpreted by the custom of the district, for what would be good husbandry in one place may not be so in another [V. d. L. Tr. Hen. p. 193, n.].

Ambiguous terms in contracts.

Ambiguous terms in contracts must be construed against the person who offered them, and could have more clearly written down the agreement. If a doubt arises on a matter of fact, it must be decided in favour of the person speaking [*Cens. For.* 1. 1. 1. 16]. All promises are interpreted strictly, and in such a way as to burden the promisor least [Grot. 3. 3. 54].

Custom.

(5) Custom or usage is of such authority in the interpretation of contracts that the usual covenants in a contract are understood to be comprehended in it, although not expressly mentioned. (6) One covenant in

a contract may be explained by others in the same contract, whether they follow or precede it. (7) In cases of doubt, the words of the covenant must be taken most strongly against the obligee and in favour of the obligor. (8) However general the expressions in a contract may be, they are restricted in interpretation to those matters only which the parties appear to have contemplated as their objects in contracting, and are not extended to others of which they do not appear to have thought. (9) Under a universal term are comprehended all the species included under it, even those with which the parties themselves may appear to be unacquainted.

(10) When a case is expressed in a contract on account of any doubt which there may be whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent which the engagement has of right in respect to all cases not expressed. Thus, if it is said in a contract of marriage that the intended husband and wife shall be in community of property, which community shall comprise the movable property that may fall to either of them, this clause does not prevent all other things from forming a part of the community which would do so of common right. (11) In contracts as well as in testaments a clause conceived in the plural may be frequently distributed into several particular clauses. For instance, where in a donation to two donees, it is provided that the property donated shall after their death without children be restored to the donor, it is to be interpreted to mean that on the death of one of the donees his share is to revert to the donor, and on the death of the other donee his share is, likewise, to revert to the donor. (12) What is at the end of a phrase commonly refers to the whole phrase, and not to what immediately precedes it, provided it agrees in gender and number with the whole phrase.

For instance, where a farm is sold with all the corn, fruits, and wine that have been got this year, the sentence, "that have been got this year" refers to the whole phrase and not to the wine only. It would be otherwise if in this sentence the verb used is "has been got" instead of "have been got." [See Poth. 1. 1. 1, 7].

Obligations that take rise from natural principles of law and equity.

There are certain obligations which take their rise not from any contract or *quasi* contract, or crime or *quasi* crime, but solely from the natural principles of law and equity. Of this nature is the obligation of children, when in competent circumstances, to maintain their indigent parents, of a married woman who has borrowed money without the knowledge of her husband, to return this money if she has profited thereby [V. d. L. 1. 14. 5].

Subject of obligation.

The subject of an obligation may be either a particular and special thing which the obligor is bound to give, or a particular act which he is bound to do or refrain from doing. Everything which is an object of commerce may also form the subject of an obligation, whether the thing be specially defined or not, for example, when any one binds himself to give me a horse without stating which horse, unless the uncertainty be of such a nature as to render the obligation void. The same with respect to things of which the quantity is actually defined, and of those of which the quantity cannot at the time be defined, as the promise of guarantee or indemnity from damages. So also of things which are already in being, or *esse*, and of those which are *in futuro*, as for example, the sale of the wine to be made the next vintage. The same may be also said of the contract for things which belong to the obligor or to a third person. In the latter case he is bound to purchase it from the owner in order to fulfil his contract, or in case of the refusal of the owner to sell it, to satisfy the other party in damages arising

from the non-performance of this contract [V. d. L. 1. 14. 6].

Obligations with respect to property consecrated to God, &c.

Obligations with respect to property consecrated to God or used for purposes of interment, that is, if they aim at the use of such property for purposes other than interment or, without the consent of the Sovereign, property set apart for the constant use of the State or of the towns are invalid [Grot. 3. 1. 40].

Promise to give that which is already property of party promised.

A promise to give any one something that is already his, or which will be his at the time fixed for the fulfilment of the promise, is null and void [Grot. 3. 3. 43].

When obligations are void.

In order that a particular act may be the subject of a contract it is necessary that it be possible [V. d. L. 1. 14. 6]. Obligations are void not only whereby anything impossible is promised, as the delivery of an animal which is dead, or something which is forbidden by natural law, but also something is promised which is regarded as dishonourable by municipal law and morality, as to do or omit to do anything wicked or to remit the punishment of some crime not yet committed [Grot. 3. 1. 42]. An act that does not strictly fall within this description may be the subject of contract. Thus, a contract to teach devil-dancing, it has been held, is not bad for illegality [2 Lor. 106].

Contract to teach devil-dancing.

Impossibility arising after contract.

Impossibility arising subsequently to the contract does not excuse performance, unless created by law; or unless continued possibility of performance is an implied term of the contract [*Brown v. Royal Insurance Co.*, 28 L. J. Q. B. 275; *Taylor v. Caldwell*, 32 L. J. Q. B. 164; 6 C. R. C. 597].

Accident.

A person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance by reason of *vis major* or inevitable accident, by which he becomes in fact unable to perform it [*Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; 1 C. R. C. 338].

The act also to which the party binds himself must be something precise and definite. Thus, an engagement to build a house without saying where is ineffectual. The act also must be of that nature that the party in whose behalf it is stipulated shall have an interest in its being done or not done, and it is further necessary that this interest should be capable of being clearly valued in damages [V. d. L. 1. 14. 6].

Time for performance of contract.

Promises may be made to take effect at or up to a certain time [Grot. 3. 3. 51], and he who contracts to give anything is bound to deliver it at a proper time and place to the other party or to any one empowered by him to receive it [V. d. L. 1. 14. 7]. When something is promised to be fulfilled at a certain time, the right vests at once, but cannot be enforced before the time arrives. Where, however, no day is fixed, the debt may at once be claimed, unless the fulfilment of the obligation, as, for instance, the delivery of a house, of necessity requires some time [Grot. 3. 3. 51].

Promise to be fulfilled within a certain time, but repudiated during such time.

Where a promise is made by A to marry B after the death of A's father, and before the death of A's father he expressly repudiates the promise, B can on such repudiation sue A for breach of his promise. He is not bound to wait until the death of A's father [*Frost v. Wright*, 41. L. J. Ex. 78].

Calculation of time.

In the calculation of time the general rule is to exclude the first day of the period and include the last [Arch. Prac. 434 ; *Wickremosooria v. Appusinho*, 1. N. L. R. 178], except when, in the case of acts required to be done by the rules and practice of the courts within a particular number of days, the last day falls on a Sunday or public holiday, in which case the time is extended to the following day [*Ahamado Lebbe v. Markar*, Ram. 1843–1855, p. 7].

It has, however, been held in the case of a lease for three years commencing from the 16th December, 1892, where the lessee had entered into possession of the land

leased on that day, that in the calculation of the term that day is to be included, and that the lease terminated on the 15th December, 1895 [*Andris v. Silva*, 2 N. L. R. 175.]

A promise that something will be given or done at another place implies a sufficient time to allow of the promise being properly fulfilled, and if such time is expressly excluded, the thing promised will be regarded as impossible [Grot. 3. 3. 53]. If that which is to be given consists in a certain definite thing, the party bound must take good care of it till the time of payment or delivery; and in case of want of due care, or if purposely or through neglect the thing perishes, or is lost or spoiled, he is bound to the other party in damages and interest; but this is not the case when it is the consequence of unforseen accident or irresistible force. The party is also liable in damages when he does not deliver the thing at the proper time and manner [V. d. L. 1. 14. 7]. All obligations include this liability to make compensation for all damage and loss of profits incurred after demand made or after the stipulated day [Grot. 3. 1. 46].

Obligor liable for fruits and interest.

The obligor is also liable for the fruits and interest from the day that he by due notice has been placed in a state of default [Grot. 3. 1. 45; V. d. L. 1. 14. 7].

Where one binds himself to do or to refrain from doing a thing.

The consequence of an obligation by which any one binds himself to do anything consists in this, that he must do the act stipulated for, and on failure is liable in damages and interest to the person in whose behalf he has bound himself. If the obligation consists in refraining from some particular act, and he does this, he is liable in damages and interest arising from the prejudice caused by this act to the party in whose behalf he was bound not to do it [V. d. L. 1. 14. 7].

On the side of the creditor or obligee the consequence of the obligation is that he has the right to demand

from the debtor or his heirs payment or satisfaction of that which he has bound himself to give [*Ibid.*].

Where obligation is to do something.

If the obligation consists in the doing some particular act, then the obligee may sue the obligor for the performance of that act, or compensation in damages and interest [V. d. L. 1. 14. 7]. From this it would appear that specific performance could be enforced under the Roman-Dutch Law. This seems to be the common opinion and most received in practice, but, on the other hand, the rule "*Nemo potest precise cogi ad factum*" is said to be more in accordance with law [V. d. L. Tr. Hen. p. 198, n.]. Grotius says that, although by natural law a person who has promised to do something is bound to do it if it is in his power, he may nevertheless by municipal law release himself by paying the other contracting party or acceptor the value of his interest in the same or the penalty, if any, which has been agreed upon in default of payment [Grot. 3. 3. 41]. "At the present day," says the translator in a note [Tr. Maas. 325, n.] he cannot so release himself, but may be compelled by civil imprisonment to the strict fulfilment of what he has promised.

Specific performance.

Some writers on Dutch Law adopt the rule, *Nemo precise cogi potest ad factum*, which precludes the right to demand an order of court enforcing the performance of a contract, and leaves the aggrieved party only the remedy of damages. Other Dutch jurists adopt a different view. Whatever may be regarded as the correct view, there is no doubt that the practice of specific performance, which provides the most effectual remedy for breach of contract, has been fully adopted in South Africa. There is therefore no difference between English and Dutch Law in South Africa on this point [Mor. Eng. and R.-D. Law 83].

The right specifically to compel a person to give something which he has promised to give, or to do something which he has promised to do, has been

frequently recognised and given effect to in our courts. If the thing cannot be given or done, then its equivalent, *id quod creditoris, interest præstationem fieri*, is exacted [*Holmes v. Alia Markar*, 1 N. 282; 2 Br. 352]. Where plaintiff prayed for the specific performance of a contract set forth in a deed which had been assigned to him, or in the alternative for damages, and it appeared to be the intention of the parties that the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price stipulated, it was held that the plaintiff was entitled to a decree for specific performance, and if it was found, for any valid reason, impossible to execute the conveyance ordered, the defendant might be condemned to pay the damages claimed [*Ibid.*].

Alternative stipulation for damages.

Where, however, an agreement contained a stipulation for damages, if the defendant failed to sell to the plaintiff a certain parcel of land, and the defendant sold the land to a third party, it was held that the defendant having put it out of his power to specifically perform his agreement to sell the land to the plaintiff, the plaintiff could not claim specific performance. The penal stipulation was, in fact, held to have been intended to be an alternative to the principal obligation on the part of the defendant, and not merely accessory to it [*Matthes v. Raymond*, 2 N. 270].

When specific performance will not be ordered.

Specific performance will not be ordered where the actual carrying out of the agreement as distinguished from compensation in money for the breach cannot be of importance to the plaintiff [*Cuddee v. Rutter*, Viner Abr. Vol. V., 538; 6 C. R. C. 640]. Nor will the court order specific performance of a contract the execution of which it cannot superintend; but where the contract to perform a service is accompanied by a stipulation not to do certain acts in derogation of the value of that service, the court will enforce the negative stipulation

by injunction [*Gervais v. Edwards*, 2 Dr. and War. 80; 6 C. R. C. 648].

Where the plaintiff has so acted as to have deprived the defendant substantially of the benefit which he should have obtained under the contract, specific performance will not be decreed [*Knatchbull v. Grueber*, 1 Madd. 153; 6 C. R. C. 668]. Completeness and certainty of the contract are essential to form the ground of a claim to specific performance [*Milnes v. Gery*, 14 Ves. 400; 6 C. R. C. 683].

The court will refuse to order specific performance for want of mutuality; that is to say, if the contract cannot be specifically enforced against the plaintiff [*Flight v. Bolland*, 4 Russ. 298; 6 C. R. C. 693]; nor will the court allow specific performance of a contract which is not fair, or which would impose unnecessary hardship on either of the parties to it [*Twining v. Morrice*, 2 Bro. C. C. 326; *Bedford (Duke of) v. The Trustees of the British Museum*, 2 My. & K. 555; 6 C. R. C. 698].

"Damages."

By "damages and interest" is understood the loss which any one has sustained and the profit which he might have made. The assessment, however, of the damage is subject to some limitation, so as to prevent its being excessive, or exceeding the double value of the thing taken according to its intrinsic worth [V. d. L. 1. 14. 7].

Tests of damage.

If the special circumstances in which a contract is made are known to both parties, the damages resulting from a breach would be the amount of injury which would ordinarily follow from the breach in such special circumstances [Vand. D. C. 213].

Damage—what it consists in.

Damages and interests, says Pothier, are the loss which a person has sustained or the gain which he has missed; and therefore when it is said that a debtor is liable for the damages and interests resulting from the non-performance of an obligation, it is to be understood that he ought to indemnify the creditor for the loss

which the non-performance of the obligation has occasioned to him, and for the gain of which it has deprived him. The debtor, however, is not liable to indemnify the creditor for all the loss occasioned by non-performance of the obligation, nor is he answerable for all the gain which the creditor might have acquired if the obligation had been performed. Each case must depend upon its own merits, and a certain amount of moderation is to be exercised in estimating the extent of liability [Poth. 1. 2. 3].

Moderation to be exercised in estimating loss.

Damage where debtor is not guilty of fraud.

When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements, the debtor is only liable for the damages and interest which may have been contemplated at the time of the contract [*Ibid.*].

Damages contemplated by parties.

In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer for the non-performance of the obligation with respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby with respect to his other affairs. The debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, *domni et interesse ipsam rem non habitam.* For instance, if I sell a person a horse which I am obliged to deliver within a certain time, and I cannot deliver it accordingly, and if in the meantime horses have increased in price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is damage for which I am obliged to indemnify him. But if the purchaser, in consequence of my default, was prevented from performing a particular journey, and thereby suffered special loss, I should not

be liable to make good such loss; because it is foreign to the obligation, and could not be supposed to have been contemplated at the time of the contract. So, if I leased a house for eighteen years in the *bonâ fide* belief that it belonged to me, and after eight years my tenant is evicted by a superior title, I should be answerable for his loss arising from the expense of removal to another house and also from his being obliged, in consequence of a general advance of rents, to take another house at a higher rent for the remainder of the term. But if the tenant had established a business in the house which I had let to him, and his removal occasioned a loss of custom, and an injury to his business, I should not be answerable for this damage, as it is foreign in its nature to the contract, and could not be said to have been foreseen at the time it was entered into. Still less should I be liable for the damage occasioned by any valuable furniture of the tenant being broken in the removal, for this is caused rather by the unskilfulness of the persons employed by him than by the eviction [*Ibid.*].

Damage should not be too remote.

Sometimes the debtor is liable for such extrinsic damage, that is, when it appears that they were contemplated in the contract, and that the debtor had submitted to them, expressly or tacitly, in case of non-performance. For instance, I sell my horse to a person with an express clause in the agreement to deliver the animal to him so that he may use it on a particular journey. Here, if I make default, even without fraud, in discharging my obligation, and the purchaser is, in consequence, not able to perform his journey, I am answerable for the special damage sustained by him. So, if I let my house to a person for the purpose of being used as an inn, and the tenant is evicted, the damages in which I am liable will not be confined to the expense of removal; but the loss of custom, if he is not able to secure another suitable house in the

When debtor is liable in extrinsic damage.

neighbourhood, will be taken into account in estimating damage. And so, where a builder, under agreement with me, builds me a house which, some time after it is finished, gives way owing to defective construction, the damage for which he is liable extends not only to the loss in respect of the house, but likewise to the furniture which was therein and could not be saved. If, however, I had lost jewels or manuscripts of an immense value, the builder is not to be charged for the whole of this loss. He is answerable only for the value to which the furniture of a person of my situation may ordinarily amount [*Ibid.*].

Where debtor is guilty of fraud.

The principles explained above do not apply where the debtor is guilty of fraud, for then he is liable indiscriminately for all the damage which the creditor has suffered in consequence of his fraud. So, if a person sells me a cow which he knows to be infected with a contagious distemper, and conceals this vice from me, such concealment is a fraud on his part which renders him liable for the damage that I suffer, not only in that particular cow, which is the object of his original obligation, but also in any other cattle to which the distemper is communicated. He is, however, not altogether liable in damage which is only a remote consequence, or is not necessarily a consequence of his fraud. So, in the case already put he would not be liable for loss sustained by me by reason of my not being able to pay my debts in consequence of my inability to cultivate my lands owing to the loss of my cattle. It is for the court to decide upon the remoteness of the damage claimed. In any case, a fraudulent debtor is not entitled to claim that moderation that is to be exercised in the assessment of damage where there has been no fraud [*Ibid.*].

No moderation in estimating damage to be exercised in case of fraudulent debtor.

Liability of debtor for delay.

A debtor is liable not only for damage resulting from absolute non-performance of his obligation, but also from that resulting from delay. This damage consists

in the loss which the creditor has suffered, and in the gain of which he has been deprived by the delay, provided such loss and deprivation of gain are the necessary consequences thereof. This damage is estimated rigorously, and extends to every kind of loss when the debtor delays the performance of his obligation by fraud; but when he cannot be reproached with anything more than negligence, it ought to be estimated with much more moderation, and should not be extended beyond what might have been foreseen at the time of the contract, and had therefore been expressly or tacity submitted to by the debtor [*Ibid.*].

Classification of obligations.

Obligations are according to their different natures and subjects, differently divided—First, into Natural Obligations, which are only binding in conscience; into Civil Obligations, which give a right of action; into Pure or Simple, which are free from any condition or limitation; Conditional, which are subject to some condition or limitation of time or place; Obligations to give something or to do something. Again, into Liquid and Illiquid, according as it appears from the contract itself or not what thing is due or of what nature, or how much; into Limited and Unlimited; into Simple and Alternative, that is, when the party has contracted to do several different things, but so that the performance of one is a satisfaction of the rest; into Obligations *in solidum*, wherein each of the obligors is bound in the whole, and Obligations *non in solidum*, wherein each is only bound for his share, or *pro ratâ;* into Divisible and Indivisible; into Principal and Accessory, for instance, bail or security; into Primitive and Secondary, for example, to pay the penalty stipulated in case of default; into Obligations with or without pledge or mortgage, with or without preference, &c. [V. d. L. 1. 14. 8].

Obligations *in solidum* and *non in solidum*.

Natural Obligations.

Although Natural Obligations give no right of action, yet they are so far of force that when the party under this obligation has made a voluntary payment, he cannot recover it back by any action.

Obligations subject to conditions.

Obligations are frequently made subject to some condition or proviso, that is, to depend on the contingency of some future event, the happening of which is uncertain, provided, however, that it be possible, lawful, and not *contra bonos mores*, or irreconcilable with the nature of the transaction. Such obligations, however, are held as fulfilled when the event takes place, though it should happen after the death of the person in whose behalf the obligation has been entered into. When the condition is fixed for a limited time, within which it must be fulfilled, it is necessary that the event take place within the time limited; otherwise, it is held to have failed, and the obligation becomes void. When the condition is negative, that is, provided such an event shall not take place, it is not held as fulfilled until it is become certain that this cannot happen, or when the time limited by the obligation is passed without this event having taken place. The condition is held as fulfilled when the party interested in the event of its not happening is himself and purposely the cause of its not taking place. When an obligation is dependent on several conditions it is necessary that all be fulfilled [V. d. L. 1. 14. 9].

When the condition of an obligation relates to something past or present, as if I say—"If Peter is or has been burgomaster," the obligation is immediately valid or invalid according as the condition is satisfied or not. If it relates to something future, there is in fact no obligation, but only the expectation of an obligation which passes to the acceptor's heir. Sometimes, the obligation cannot be enforced, except by the heir, as if something is promised to a person on condition that he do not go to the West Indies, for, as long as he lives,

it will remain uncertain whether the promisor will become liable or not. And, on the other hand, the heir of the promisor is bound in the same manner as the promisor himself. An impossible condition as, if I say "on condition that you build a house up to the sky," makes a promise at once null and void, and a condition which will inevitably be fulfilled makes the obligation at once effectual, as if I say, "on condition that you do not build up to the sky." The promisor who promises to do or give something if he pleases is not bound [Grot. 3. 3. 47].

Fulfilment of condition during action.

If while a condition attached to a debt is still running, the debt is sued for, and while the suit is pending the condition is fulfilled, judgment may be entered for the plaintiff [Voet 5. 1. 26].

Time of payment.

An obligation may be entered into either with the addition of the time of payment or without it. When this is not inserted, the creditor may immediately demand payment; but when the time is fixed, he cannot make any demand until after it has expired. The limitation of the time of payment differs from a condition in this, that the condition suspends the obligation which arises out of the contract; the limitation of the time of payment, on the contrary, does not suspend the obligation, but only the time of exacting the fufilment [V. d. L. 1. 14. 9].

Creditor bound to accept payment if tendered before time fixed.

As the fixing of the time of payment is supposed to be added in favour of the debtor, he is at liberty to pay before the expiration of that time, and the creditor is bound to accept the payment, if the debtor insist on it, provided it does not appear from the circumstances that this fixing of the time of payment was meant as well for the benefit of the creditor as the debtor. As the limitation of the time of payment is founded on the confidence in the solvency of the debtor, it loses its force when the debtor becomes bankrupt, or the property pledged for security is sold in execution [V. d. L. 1. 14. 9].

When debtor becomes bankrupt, &c., demand might be made before expiration of time.

Place of payment.

When the agreement fixes a place for payment to be made, neither the creditor nor debtor can compel the other to pay or receive at any other place [*Ibid.*].

When the obligation contains an engagement not yet liquidated, no execution can be had on it, until it has been liquidated and determined either by mutual agreement or judicial decree, as when a party has by agreement bound himself to make good all the damages and interest in any particular case, these must be assessed and ascertained by previous taxation, and brought to a liquidated sum [V. d. L. 1. 14. 9].

Alternative obligations.

In alternative obligations the debtor or obligor has the choice what to pay or which condition to fulfil, provided the contract does not give this choice to the debtor or obligee. The debtor, therefore, may choose which he will give of the things promised, but he cannot satisfy the condition by paying part in one and part in another, no more than the creditor, when the choice is in him, can demand to be paid in like manner [V. d. L. 1. 14. 9 ; Ram. 1820–1833, p. 70]. In the case of a promise in the alternative to give a piece of land at a certain place or a piece of land at a certain other place, the promisor may, in the absence of definite stipulation, release himself by giving either [Grot. 3. 3. 42].

Joint and several liability.

In general, when any one enters into an obligation for one and the same thing to different persons, or, on the contrary, when different persons are jointly bound to another, each is only liable or entitled *pro ratâ* as debtor or creditor of the thing. However, an obligation may be entered into by which each party may be bound or entitled *in solidum*, when this is the object of the several parties, provided however that payment made to or by one of the parties frees all the others. This is entitled an obligation *in solidum ;* and, according to the general rule, has no place, but when expressly stipulated, except in some few cases, as when the partners of any firm enter into any contract

on account of their trade, or when several persons are charged with one and the same guardianship, or when several persons have conspired together, and are equally principals in the commission of some crime, and are thus equally liable in damages, or have contracted together a debt *in solidum*, and are each liable for the whole with respect to the creditor, though among themselves the debt is divisible. Thus, with respect to the creditor, they have not the *beneficium divisionis*, or right to split the demand, yet with respect to each other, when one has paid the whole, he is entitled to demand from the creditor a cession of his right of action against the other co-debtors, which he cannot refuse; and in case he should be unable to give this cession of action, he would lose his right of suing *in solidum* any of the parties to the obligation. In case one of the debtors *in solidum* has paid the debt without taking a cession of action against the co-obligors, he cannot afterwards obtain it from the creditor, since by payment the whole of the original debt and right of action thereon is extinguished; but he is not barred from recovering in his own name from each of his co-sureties their portion of the debt, as they are considered as co-debtors or partners with him who has paid the whole, or by reason of their co-obligation *in solidum* as his sureties [V. d. L. 1. 14. 9].

Cession of action.

Effect of solidity among creditors.

The effect of solidity among creditors is four-fold—(1) Each creditor may maintain a claim in respect of the whole debt; and if the obligation is executory, may constrain the debtor to performance of it in its entirety. (2) The acknowledgment of the debt to one of the creditors interrupts prescription as to the whole debt, and it consequently enures to the benefit of the other creditors. (3) The payment made to any one of the creditors extinguishes the debt. The payment liberates the debtor as against all. It is at the choice of the debtor to pay which of the creditors he will, as long as

the matter is entire; but if one of them has instituted a process against him, he cannot make an effectual payment except to that one. (4) Each of the creditors being such for the whole may, before a process is instituted by any of the others, make a release to the debtor, and liberate him as against them all [Poth. 2. 3. 7].

How obligation *in solido* is contracted.

An obligation is contracted *in solido* on the part of the debtors when each of them is obliged for the whole, but so that a payment made by one liberates them all. Those who obliged themselves in this manner were called *correi debendi*, while *correi credendi* and *correi stipulandi* were the terms used to denote creditors who were severally entitled to enforce obligations in their favour [Poth. 2. 3. 8. 1].

Correi debendi, correi credendi, correi stipulandi.

How solidity among creditors was induced.

Solidity on the part of creditors was induced when the obligation of the same thing contracted in favour of several persons was contracted in favour of each for the whole, as completely as if each of them was the sole creditor, but with the qualification that a payment made to one was a liberation against all the others. Solidity on the part of the debtors in like manner consisted in the obligation of the same thing being contracted by each for the whole as completely as if each was the single debtor, but so that a payment made by one liberated the others [Poth. 2. 3. 8. 1].

Among debtors.

It is not always sufficient to constitute an obligation *in solido* that each of the debtors is debtor of the whole thing, for this is the case with respect to indivisible obligations which are not susceptible of parts, though they are not contracted *in solido*. It is requisite that each of the debtors *totum et totaliter debeat*, that is to say, it is requisite that each should be as completely bound for the performance of the whole as if he alone had contracted the obligation. The fact that they are obliged differently makes the obligation none the less solid, provided they are each obliged totally for the

same thing; as if one is obliged purely and simply, and the other subject to a condition or a term of payment, or if they are obliged to pay at different places [*Ibid.*].

Rights as between themselves of debtors *in solido*.

When several persons contract a debt *in solido*, it is only in respect of the creditor that they are debtors of the whole. As between themselves the debt is divided, and each of them is only debtor *pro se* as to that part of the debt of which he was the cause. If, for instance, two persons borrow together a sum of money which they engage *in solido* to repay, if they divide the money equally between themselves, each of them, although debtor for the whole with regard to the creditor, is only debtor for a moiety in respect of the other. If the division is unequal, *e.g.*, one has two-thirds of the money, and the other the remaining third, he who has two-thirds would, as between themselves, be debtor for two-thirds, and the other for only a third of the amount. If one of them alone derive a benefit from the contract, and the other is only engaged on his behalf, the person having the benefit is the only debtor. The other, although a principal debtor so far as concerns the creditor, is in respect of his co-debtor only a surety. So, if the debt arises from an injury committed by four persons, each is a debtor for the whole in respect of the person suffering the injury; but as between themselves, each is only debtor for his share in the injury, that is to say, for a fourth of the whole [Poth. 2. 3. 8. 1].

Solidity must be subject of stipulation.

Solidity must be stipulated in all contracts of whatever kind. As already observed, strictly speaking, it ought to be expressed. If it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. So, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was

adjudged that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others, for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido* [Poth. 2. 3. 8. 2].

When solidity is presumed.

There are, however, as observed already, certain cases in which solidity between several debtors of the same thing takes place, although it is not expressly stipulated. Where, for instance, partners in commerce contract some obligation in respect of their joint concern, where several persons act in concert in the commission of an injury, where a testator charges his heirs or other successors with the performance of a legacy, obligations *in solido* are induced [Poth. 2. 3. 8. 2].

Effects of solidity between debtors.

The effects of solidity between several debtors are—(1) That the creditor may recover from any one of the debtors he pleases, by action if the debt only lies in action, or by distress if it lies in execution, the entirety of that which is due. The choice which the creditor makes of one of the debtors does not liberate the others until he is paid. He may discontinue his pursuit of one, and proceed against the others, or if he pleases he may proceed against them all at the same time. The judicial demand which he makes against one of the debtors *in solido* interrupts the course of prescription against all the others. When the thing which is due has perished by the act or fault of one of the debtors *in solido* or after his default, the debt is perpetuated not only as against that debtor, but as against all the others. (2) The payment which is made by one of the debtors liberates all the others. Not only an actual payment, but anything that amounts to payment has this effect. So, if one of the debtors *in solido* being sued by the creditor opposes, in compensation of the debt demanded, a like sum owing to him from the creditor, the other debtors are liberated. If, however, A and B being my

debtors *in solido* I become the debtor of A, and sue B for the debt due to me, the question arises whether he can oppose by way of compensation the debt which I owe A. The question has been answered in the negative, but the more practical opinion seems to be that of Domat, who maintains that B may oppose the compensation of what I owe to A so far as A is debtor as between him and B and no further. (3) The release of the creditor to one of the debtors would also liberate the others, if it appeared that the creditor intended thereby to extinguish the debt as to the whole. If it appeared that his intention was only to discharge as to the part for which the person to whom he gave the release was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist as to the residue in the co-debtors. If, however, the creditor, in the discharge which he gave the co-debtor, expressly declared that he intended only to discharge the person of the particular debtor and to retain his claim against the others, he could not recover the whole of his claim from the other debtors without deducting the part of him who was discharged. The reason is that the creditor, having put it out of his power to cede his action against the debtor whom he has discharged, and consequently having incapacitated himself from performing the condition upon which he has a right to demand the whole, cannot demand the whole from each debtor. (4) When one of the debtors *in solido* becomes the only heir of the creditor, the debt is not thereby extinguished against the others; but this heir cannot demand from the other debtors without deducting the proportion for which he is liable in respect to them; and if any of them be insolvent he ought, besides, to bear his proportion of the share of the insolvent. It is the same in the opposite case where the creditor becomes the only heir of one of the debtors [Poth. 2. 3. 8. 3].

Surviving spouse and heirs of deceased spouse not debtors *in solido.*

Where a person married in community of property contracts a debt, and thereafter his wife dies, he (the surviving spouse) on the one side, and the heirs of the deceased spouse on the other, do not become debtors *in solido* in respect of the debt. A payment, therefore, by the surviving spouse does not interrupt prescription to the prejudice of the heirs of the deceased spouse [*Fernando v. Silva*, Ram. Rep. 1872–1876, 320].

Interruption of prescription.

Indivisible obligations.

An indivisible obligation is an obligation in respect of a thing or act which is not susceptible of parts, either real or intellectual. When two or more persons have contracted a debt of this kind, although they have not contracted it *in solido*, nevertheless each of the persons obliged is debtor for the whole of the thing or act that forms the object of the obligation. He cannot be debtor for a part of it only, since it is supposed that the thing is not susceptible of parts. When the person who has contracted a debt of this kind has left several heirs, each of the heirs is debtor for the whole of the thing; and so when the creditor of such a debt has left several heirs, the thing is due in its entirety to each of the heirs [Poth. 2. 4. 3. 1].

Difference between indivisibility and solidity of obligation.

So far, indivisibility of obligation agrees with solidity, but it must be remembered that indivisibility arises from the quality of the thing due which is not susceptible of parts, while solidity arises from the act of the persons who are each obliged for the whole. It is a personal quality which does not prevent the obligation *in solido* from being divided amongst the heirs of each of the debtors *in solido* who have contracted it and amongst the heirs of the creditor in whose favour it has been contracted [*Ibid.*].

Conversion of primary obligation, by non-performance, to secondary obligation, *e.g.*, to pay damage.

In the case of an obligation in respect of which the debtors are bound *in solido*, if the primary obligation be converted, by its non-execution, into a secondary obligation, they are bound *in solido* for this secondary obligation also. For instance, if two are obliged *in*

solido to build me a house within a certain time, each will be liable *in solido* in respect of damages for non-performance of the primary obligation. On the contrary, if the obligation is not *in solido*, but merely indivisible, and it is converted as stated above into a secondary obligation to pay damage, the debtors would be bound each for his part only [Poth. 2. 4. 3. 1].

The same observations apply with respect to several creditors or the several heirs of one creditor. When the obligation is indivisible, each of the heirs may demand the whole thing from the debtor, but if the debtor be condemned in damages for non-performance, each heir can recover his share only of such damages. In the case of creditors *in solido* [*correi credendi*] if upon the demand of any one creditor the debtor fails to fulfil his obligation, such creditor may recover the entirety of the damage resulting from the default [Poth. 2. 4. 3. 2].

Liability to be sued on joint contract after death of one contractor.

Upon a joint contract where there is no partnership between the contractors, and one of them is dead, the liability to be sued survives to the surviving contractors alone, and not to the surviving contractors and the legal representatives of the deceased contractor jointly [*Walliappa v. Sinne Tamby*, 3 C. L. R. 90; 1 N. L. R. 350].

An agreement whereby several persons agreed to sell and deliver all the arrack distilled in their respective distilleries for payment to be made to each for the quantity delivered by him was held to be a joint agreement, so that the vendee could sue any one of the vendors for non-delivery of the arrack distilled by him [3 Lor. 272].

In the case of several joint creditors could each sue for his share?

In *Ukku Banda v. Lapaya* [2 C. L. R. 38; 1 S. C. R. 98] Clarence, J., was of opinion that in the case of a debt due to several creditors jointly, the debtor could not be sued piecemeal, but all the creditors must join

in one action, calling in aid the provisions of section 17 of the Civil Procedure Code for that purpose if necessary. The debtor, he thought, had a right to object to being sued piecemeal for his debt; but in *Buddharakita v. Gunesekere* [1 N. L. R. 206] it was held that in the case of joint lessors each could sue the lessee separately for his moiety of the debt.

When creditors have joined in stipulating for the payment of a sum of money, each is entitled to his *quota* of that sum. When several debtors join in promising to pay a sum of money, each is liable to pay a *quota* of that sum of money, and no more. This happens even when a plurality of debtors or creditors intervene by the death of a single creditor or debtor leaving several heirs at law [*Per* Withers, J., in *Buddharakita v. Gunesekere*, 1 N. L. R. 206]. The judgment in *Panis v. Selenchi* [7 N. L. R. 16] is to the same effect. There it was held that when two or more persons joined in stipulating for the payment of a certain sum of money, each was ordinarily liable to pay a *quota* of that money, and it was only when the intention of the parties was clearly expressed that each person should severally pay the whole that each person became bound *in solidum;* and so where two lessees covenanted to pay a certain sum of money as rent, and there were no words in the lease clearly showing that each lessee bound himself *in solidum*, each was not severally liable for the payment of the whole rent.

Agents appointed to act jointly.

Where an authority is given to two or more persons to do an act, the act is valid so as to bind the principal only when all of them concur in doing it. The authority is to be construed strictly, and the power in the absence of express words to the contrary is to be deemed to be joint and not several. Where A and B are named "my true and lawful attorney or attorneys," the power is joint [*Muttiah v. Karuppaya*, 6 N. L. R.

285; *Muttiah v. Karuppaya*, 6 N. L. R. 306; *Mudianse v. Mohamado*, 3 Br. 145].

Vendors of property from which purchaser suffers eviction.

Where a person is evicted from land sold to him by several vendors, they are not liable for the whole damage *in solidum*, but each for his share only [*Babasinno v. Sasira*, 5 N. L. R. 34; 1 Br. 422]. Trespassers, on the other hand, are jointly and severally liable [Vand. D. C. 101]. So, where the defendants wrongfully broke through the limits of their plumbago mine into the adjoining mine belonging to the plaintiff, and got therefrom a quantity of the plaintiff's plumbago, in an action to recover the value of the plumbago wrongfully dug and removed, it was held that the defendants were bound to make compensation *in solido* to the plaintiff.

Trespassers.

Their several liability.

Measure of damage.

As to the amount recoverable by the plaintiff it was held in the same case that the right estimate of the plaintiff's loss which was the measure of his damages would be to ascertain the market value of the plumbago at the pit's mouth on an average of prices which ruled between the dates of the beginning and end of the wrongful working, and to deduct from it the actual cost per ton of severing the plumbago and raising it to the surface [*Att.-Gen. v. de Mel*, 7 N. L. R. 70].

Payment to one of several creditors.

Payment after action to one of several joint creditors is equivalent to payment to all [*Tamby Appu v. Canagesabay*, 7 S. C. C. 127; *Wallace v. Kelsale*, 7 M. & W. 264].

Liabilities of heirs in divisible obligations.

When an obligation is divisible, each heir of the debtor is not further answerable than *pro ratâ* for the portion in respect of which he is heir; and each of them may satisfy his share of the obligation by paying to this amount; but if the obligation is indivisible, then each of the co-obligors is liable in the whole, although he has not bound himself *in solidum*, and each of the heirs of the obligee is entitled to demand the thing entire from the debtor, as, on the other hand, it may be demanded also from each of his heirs respectively [V. d. L. 1. 14. 9].

Obligations pass against heirs.

All obligations and personal claims (except where expressly otherwise provided by statute) pass against the heirs and that in proportion to the share of each in the inheritance except where the subject-matter of the suit is indivisible, as a prædial servitude or a certain act, for in that case each heir may be sued for the whole, and, if one pays, he releases the others, saving to himself his recourse against them [Grot. 3. 1. 44].

Parties to contracts stipulate for their heirs.

A claim is not extinguished by the death of the creditor. A person is supposed to stipulate as well for himself as for his heirs and other universal successors. Therefore, by the death of the creditor the claim passes to the persons of his heirs who succeed to all his rights. In like manner, the obligation is not extinguished by the death of the debtor, for we are deemed to engage as well for ourselves as for our heirs and other universal successors. Therefore, when the debtor dies, the obligation passes to his heirs who succeed to also all his rights and obligations [Poth. 3. 7. 3. 1].

Rights and liabilities pass to heirs in obligations to give as well as to do anything.

The principle that obligations pass to the heirs of the debtor, and that the right which results therefrom passes to the heirs of the creditor, holds good not only with regard to obligations which consist in giving, but with regard to those for doing anything [*Ibid.*].

Claims which are extinguished by death of creditor.

There are, however, claims which are extinguished by the death of the creditor, such as those which have for their object something personal to himself, as if a person obliges himself to allow me the use of a certain book whenever I should require it, or to accompany me in my journeys, the object of my claim being personal to myself, the claim should be extinguished by my death.

Claim on judgment.

But if I had obtained a judgment for damages against my debtor for the non-performance of his obligation, the claim on this judgment would pass to my heirs. A claim for the reparation of injuries is also extinguished by the death of the creditor or person injured, if during his lifetime he had not made any

complaint or demand in a court of justice. Where no such demand had been made, the injured party would be deemed to have forgiven and pardoned the injury [Poth. 3. 7. 3. 2].

Debts which are extinguished by death of debtor.

There are also some debts which are extinguished by the death of the debtor. Such are those which have for their object some personal act of the debtor himself, as if a man engages to serve me as a shepherd or in any other capacity. If the debtor, for non-performance of such an obligation, is condemned in damages, this obligation which succeeds to his principal and original obligation devolves upon his representatives. In other cases than those of personal acts, a person who engages for the performance of any act, and dies before it is performed transmits the obligation to his heirs. By the Roman law obligations arising from offences were for the most part extinguished by the death of the debtor or person committing the injury, unless judgment had been obtained on the demand during his lifetime. They did not affect his heirs, except perhaps to the extent of the benefit which they derived from their succession to the deceased. The action called *condictio furtiva*, for the repetition of property stolen, was alone maintainable against the heir, although he did not derive any benefit from it [Poth. 3. 7. 3. 3].

Roman Law on the subject.

Heirs bound by obligation of ancestor.

Heirs are bound by the obligation of their ancestor, although they are not expressly named in the contract, except where the obligation is personal to the ancestor, or arises *ex delicto* [*Vanderstraaten v. de Latre*, Vand. 1].

And entitled to its benefits.

By an instrument, the grantee was to have possession of certain land "with power to him to open pits at his expense and to discover veins and beds of plumbago in any manner he pleased, for and during a period of forty years." The instrument contained the following clause also—"Both parties for themselves and for and on behalf of their respective heirs hereby

become bound for the fulfilment of the above agreement." It was held that the license granted by this agreement to dig plumbago, &c., was not personally to the grantee, but that on his death the interest created by it passed to his heirs [*Appuhami v. Punchi Menica*, 3 S. C. R. 68].

Heirs liable to extent of benefits derived.

Where on the death of a debtor his next of kin enter into possession of his estate and by active steps take benefit therefrom, they become liable for the debts of the deceased to the extent of the benefit [*Pulle v. Pulle*, 2 S. C. R. 105]. Although, as here stated, an heir or devisee under a will is, as a general rule, liable for the testator's debts to the extent of the share of the inheritance or estate which has come into his hands, whether by operation of law or by conveyance from the executor, and a creditor of the deceased testator is entitled to follow the property in the hands of the heir, yet, where the property sought to be followed was settled *bonâ fide* on the heir or devisee in consideration of marriage, it is not liable to the claims of the deceased's creditors [*Fernando v. Fernando*, 5 N. L. R. 220; 2 Br. 277].

Property *bonâ fide* settled on heirs cannot be followed in their hands.

Heirs may be sued although estate is over one thousand rupees.

In the case of *Sevalingam v. Kumarihami* [9 S. C. C. 181] it was held that section 547 of the Civil Procedure Code did not apply to actions brought against the estate of a deceased person, but only to actions brought on behalf of the estate to recover something claimed as belonging or due to such person, and so the heirs of a debtor may be sued for his debts although his estate is worth over one thousand rupees and no administration thereto has been taken out [*Mudianse v. Fraser*, 9 S. C. C. 181]. Heirs, however, are liable only if they have entered on the inheritance and taken possession, and actions against them must be brought within a reasonable time [D. C., Kandy, 9,810, 1 Br. 121].

Actions against heirs must be brought within reasonable time.

Heir of deceased mortgagor may redeem.

Any one of the heirs of a deceased mortgagor who have inherited the mortgaged property can maintain an action to redeem without letters of administration

to the estate of the mortgagor [*Siribohamy v. Rattranhami*, 1 C. L. R. 36].

Alleganda et probanda in action against heirs.

Where a creditor sues the heirs of a deceased debtor, the plaint must show that the defendants possessed themselves of the estate of the debtor in such a way as to make them responsible for the claim to the extent of the assets in their possession [*Paramanather v. Paramanather*, 3 N. L. R. 79]. Further, as to the *alleganda et probanda* necessary to render heirs in possession liable and the extent of their liability, see *Adagappa v. Beeber* [6 S. C. C. 110] and *Chetty v. Ettana* [2 S. C. R. 110].

All principals must be sued together.

Where one of several joint debtors pays the whole debt.

When there are several principals [*correi debendi*] to one promise, all must be sued together, and may release themselves by each paying his share; but if one of them voluntarily pays the whole, he releases the others, but has his recourse against his co-principals. If, however, one is released from his share without payment, that does not release the others [Grot. 3. 3. 8]. This necessity of suing all together as also the division of a debt does not take place, if one of the principal debtors is notoriously unable to pay, or is absent from the country, or if the debtors have voluntarily renounced the privilege of being sued together [*beneficium de duobus vel pluribus reis debendi*] and of having their debt divided [*beneficium divisionis*]—[Grot. 3. 3. 9, 10, 11].

Promise not accepted.

A promise which is not made with the object of being accepted, or even which is not actually accepted, gives no personal claim, but a promise made for the glory of God, or for the honour of the country or of a town, is in law considered as an accepted promise, so that even the heir who otherwise would not be bound by the mere promises of his predecessor may be judicially sued on it [Grot. 3. 1. 48].

Promises based upon reasonable cause give right of action.

All promises based upon any reasonable cause, in whatever terms expressed and whether the parties were together at the same place or not, give a right

both of action for a plaintiff or of exception for a defendant [Grot. 3. 1. 52].

Where a promise is implied.

A promise is sometimes implied in law. Thus, where one is by law obliged or compelled to do what another is bound to do, a promise by the latter to make good to the former what he has lost is implied. So, where A was the holder of a mortgage over a land of which B was the owner, and B having failed to pay the commutation tax due on the land, the Government seized and sold the land, but on A coming forward and paying the tax the sale was cancelled and B released from liability to pay the tax, it was held that a promise was here to be implied by B to reimburse A [*Velaithan v. Nallatamby*, 1 S. C. R. 290; 2 C. L. R. 120].

Reasonable cause is considered to be present when a promise is made with the object of a gift or is accessory to some other transaction, whether it is made at the time of such transaction or afterwards [Grot. 3. 1. 53].

Acceptance of document is acceptance of promise.

In the case of a written agreement the promise is held as sufficiently accepted by the acceptance of the document or acknowledgment of debt [Grot. 3. 5. 2].

Exceptio de non numerata pecunia.

Whenever the document is for money lent, since people frequently deliver the acknowledgment before actual payment, it has been enacted that the obligor may within two years, reckoned from the date of the acknowledgment (unless he is a minor or absent from the country, in which case the time is reckoned from the termination or removal of such obstacle), defend himself by saying that the money has not been paid (*exceptio de non numerata pecunia*), and this will be sufficient, unless the creditor proves the payment, but after the lapse of the two years it will not be sufficient, unless he can prove that payment had really never been made [Grot. 3. 5. 3].

It has been several times decided by the Court of Holland that the obligor cannot take advantage of this

exception, but that he is bound to make proof even within two years [Grot. Tr. Maas. p. 334, n.].

Written acknowledgment is conclusive proof of fraud.

In all other matters the written acknowledgment is held as conclusive proof, unless it can be shown that some fraud has been perpetrated therein [Grot. 3. 5. 4].

A person who is sued upon a written document must acknowledge or deny his signature, and so must his heirs at least in good faith, that is, so far as they know [Grot. 3. 5. 5].

Document payable to holder.

On a document payable to the holder any one who has the document in his possession may sue, unless it be proved that he came by it fraudulently [Grot. 3. 5. 6]. But if the document is not made payable to the holder, the person who has the document in his possession may not sue without cession of action or transfer, even if he had advanced the money which gave rise to the debt and document [Grot. Tr. Maas. p. 335, n.].

Money paid without reasonable cause may be recovered.

Whatever one has, without gift, payment, or promise, acquired out of another's property without legal cause may be recovered from him by the owner; for instance, where a person thinks that he is receiving money from a third person, and my money is paid to him [Grot. 3. 30. 18].

Stipulation in favour of third party.

A simple stipulation in favour of, or acceptance for, a third party (except for one who can by law acquire a personal claim through another) is null and void, unless made for the service of God, or for the poor, or unless the acceptor has himself an interest in the same, or unless a penalty is thereby imposed upon the promisor in case of non-performance. The third person may, however, accept the promise and thus acquire a right, unless the promisor revokes the promise before such acceptance by such third person [Grot. 3. 3. 37].

Penalty.

In order to secure the fulfilment of an obligation, or to indemnify the obligee for non-performance, it is useful and customary to annex a *penalty* in case of default. When the principal obligation is extinguished,

the extinction of the penalty follows of course; but, on the other hand, the nullity of the penal clause does not induce that of the principal obligation. The penalty in case of non-performance of a condition may, when it is excessive, be limited and diminished by the judge. A debtor by satisfying with the consent of his creditor part of the obligation is freed from the penalty as to that part [V. d. L. 1. 14. 9]. Although the stipulation of a penalty to secure the performance of an act is valid, the legal rate of interest is not to be exceeded where the agreement is one relating to interest [V. d. K. 481].

Is a penalty recoverable under the Roman-Dutch Law?

The question whether under the Roman-Dutch law the full amount of a penalty stipulated for can be recovered was considered in the case of *Fernando v. Fernando* [4 N. L. R. 285], and it was there held that a court might award as damages the amount of the penalty stipulated between the parties, if it was not too excessive or disproportionate to the circumstances of the ease.

What is a penalty.

Withers, J., in the case of *Saibo v. Cooray* [1 S. C. R. 233] was of opinion that where it was stipulated to pay damages on a breach of contract, and the stipulation was made in respect of a sum certain, and the amount fixed on as damages was greater than that sum, it was generally to be treated as a penalty and not as liquidated damages, and only the actual damage sustained could be recovered. [See also *Huxham v. De Waas*, Ram. 1820-1833, 39; and *Davith v. Dinger*, 8 S. C. C. 84].

English Law as to penalties.

The English Law on this subject is, shortly, as follows—Where there is added to the contract a clause as to the payment of a sum of money in the event of non-performance, equity presumes it to be a penalty for which relief will be given on fair compensation being made. The presumption may be rebutted by showing that the sum was intended by the parties to be liquidated damages, or an alternative mode of

performance. The stipulation for a penalty does not prevent the court from ordering specific performance of the contract. But where a sum is agreed upon as liquidated damages, the party wronged is entitled to the sum as compensation, and to no other remedy [*Peachy v. Somerset*, 1 Str. 447 ; *Sloman v. Walter*, 1 Bro. C. C. 418 ; *Bird v. Lake*, 1 H. & M. 121 ; 6 C. R. C. 540].

If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, the sum may be recovered as liquidated damages. If a contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages. If a contract contains a number of terms, some of which are of certain and some of uncertain value, and a fixed sum is to be paid for the breach of any of them, this is a penalty [Ans. 278].

Contracts in fraud of creditors.

All contracts entered into by insolvents in fraud of creditors are void [Grot. 3. 1. 27].

Obligation in respect of share in lawsuit.

No obligation can be contracted with the object of having a share in a lawsuit, nor with respect to the inheritance of a person still alive, with the exception of the choice of law by antenuptial contract [Grot. 3. 1. 41].

Contract to defeat law or rights of third parties.

A person cannot by entering into a contract with another defeat the law or the rights of third parties. The default on the part of a father to maintain his illegitimate children is made an offence by the law, and it is the right of the children to get support. Hence no agreement or arrangement with the mother of an illegitimate child will excuse the father from supporting such child [*Saloe v. Fredericks*, Ram. 1863–1868, 87].

Wagers.

Wagers are invalid, unless there is an obligation on both sides and the contracting parties have an interest in the consideration as is the case with an insurance.

Otherwise, whatever has been given or paid may be recovered [Grot. 3. 3. 48].

Money won or paid in gaming.

A winner in gaming or gambling cannot lawfully recover his promised winnings ; and he who has once paid money lost in gaming has no right to claim it back ; nor has he who lends another money with which to gamble or wager a right to recover it [V. L. 4. 14. 5].

Contracts and *quasi* contracts from which obligations arise will now be dealt with separately.

SUB-SECTION 1.

DONATION.

DONATION or gift is a promise whereby a person without being bound to another, out of liberality, binds himself to give that other something belonging to himself without receiving anything from him in return or stipulating for anything for his benefit [Grot. 3. 2. 1]. Definition.

According to Van Leeuwen, a donation is said to be, as it were, a giving of a present, and is a benefit which any one, out of mere liberality, no law compelling him, confers on another, which, if it takes place by agreement, is rightly called a contract or pact [*Cens. For.* 1. 4. 12. 1].

Van der Linden says it is an agreement whereby any one, through benevolence or generosity, gives or grants something irrevocably to another who accepts it [V. d. L. 1. 15. 1]. Very frequently, indeed almost always, such gifts have their origin in the principle of recompense or gratitude for former services. Sometimes they are made in the contemplation of death or of imminent danger, and they are then termed *Donationes mortis causa;* otherwise, they are termed *Donationes inter vivos* [V. d. L. 1. 15. 1].

The liberality out of which a donation is made must appear in some way or other. Otherwise, it would rather be presumed that the promise was made in ignorance, in which case, no legal obligation would arise except in the case of releases from debt [Grot. 3. 2. 4]. The reason for donation must appear.

A *donatio mortis causa* may take place when a person in contemplation of death actually delivers something to another or bequeaths it to him without delivery [Grot. 3. 2. 22]. Such donations have in their effect many things in common with legacies bequeathed by *Donatio mortis causa.*

Last Will. They may be revoked during life and become void *ipso jure* in case the acceptor dies before the donor, even if delivery has been made. Persons who like minors and others may not alienate their property during life may also not make such donations. These donations when lawfully made by legally competent persons are valid, even though the donor's inheritance be not adiated. When any one on the point of death makes a donation to another without delivery, and afterwards recovers, such donation is considered as tacitly revoked [Grot. 3. 2. 23].

In English law the donation *mortis causa* is conditional on the donor's dying from his existing illness. In Dutch law, where there has been no delivery, the donation is *ipso facto* revoked by the recovery of the donor. Where there has been delivery, the donation is only revocable. It lapses when the donee predeceases the donor [Mor. Eng. and R.-D. Law, 104].

Donatio mortis causa between husband and wife.

A *donatio mortis causa* is under the Roman-Dutch law valid between husband and wife [*Cens. For.* 1. 4. 12. 24].

Requisites of *donatio mortis causa.*

To constitute a *donatio mortis causa* the donor should express in clear words and declare that he makes the gift thinking or suspecting that he is about to die. The mere mention of death is not sufficient, nor the mere fact that the gift is made by a dying person. Where there is the least doubt, a gift is considered *inter vivos* and not *mortis causa* [*Cens. For.* 1. 4. 12. 25].

Gifts may be subject to conditions, limitations, &c.

A gift may be either simple and absolute or subject to a limitation, or for a certain time, or conditional. In the case of a gift subject to a limitation the donor, if the limitation be not complied with, can claim back the thing given either from the donee or any other person in possession. So also, a gift is revoked if the condition attached to it has not been fulfilled. A gift made in consideration of marriage, if the marriage does not take place, has to be restored [*Cens. For.* 1. 4. 12. 17].

Donations originating in merit or desert are not subject to the laws which enact anything prejudicial to donations.

Donations originating in merit.

Every one who has the free disposal of his property may make a gift to any person not prohibited by law from receiving it. A father may not give a donation to his son under age, who is yet under his parental power; nor husband and wife to each other, except so far as the donation is confirmed by death [V. d. L. 1. 15. 1]. Donations by parent or husband are confirmed by death, if there is no evidence of a change in intention [Grot. 3. 2. 9].

Who may donate.

Spouses, says Van Leeuwen, are prohibited from making gifts to each other during the continuance of the marriage, if the donor thereby becomes poorer and the donee richer, unless the donor continues in his generosity until his death, and in his lifetime delivery has taken place, in which case the gift, as though it were a gift *mortis causa* which is not prohibited between husband and wife, is upheld by the benignity of the law [*Cens. For.* 1. 4. 12. 6].

Gifts to each other by spouses.

In Ceylon, a husband or wife, whether married before or after the proclamation of "The Matrimonial Rights and Inheritance Ordinance, 1876," notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, may make or join each other in making, during the marriage, any voluntary grant, gift, or settlement of any property, whether movable or immovable, to, upon, or in favour of the other, but all property so granted, gifted, or settled, except jewels, personal ornaments, and apparel suitable in respect of value to the rank and condition of life of the wife, and all acquisitions made by a husband or wife out of or by means of the monies or property of the other, is subject to the debts and engagements of each spouse, in the same manner and to the same extent as if such grant, gift, settlement, or acquisition had not

been made or occurred [Ord. No. 15 of 1876, sects. 13 and 11].

Donation by father to son.

In the case of *Fernando v. Weerakoon* [6 N. L. R. 212] it was held that though some Roman Dutch lawyers declared that a father could not gift to his minor son who was still subject to his power, yet the practice in Ceylon was for parents to donate to their minor children. Acceptance was necessary to make a donation fully effectual; but as minors could not accept, their grandparents, and parents, when not also the donors, might accept for them. In an earlier case [*Sidemberem v. Ayenpulle*, Ram. 1843–1855, 114] it was held that by the Roman-Dutch law a parent could not legally make a donation to his minor child who was still under his tutelage, but a person contending for such a power might prove a local custom superseding the written law.

Donations by those under engagement to marry.

A man under twenty-five years or a woman under twenty who has entered into an engagement to marry without the legal consent may not make a donation *inter vivos* or *mortis causa* to his or her spouse [Grot. 3. 2. 10, 26].

By married woman.

No married woman can, without the consent of her husband, make a donation, although the husband may without the consent of the wife, unless, from the special circumstances, his object appears purposely to prejudice her [V. d. L. 1. 15. 1]. No minor may make a donation to his guardian; no prodigal to his curator; and no sick person to his physician, particularly when those donations appear at all to be extravagant [*Ibid.*]. Nor can the children of the guardians of young persons under twenty-five years of age nor the sponsors of such children acquire from them any immovable property by gift *inter vivos* or *mortis causa* [Grot. 3. 2. 25].

Gifts or bequests to guardians and curators by wards or minors, either by last will or by deed *inter vivos*, of immovables, or annual rent or other charges of immovables were prohibited. Every disposition whether *inter*

vivos or testamentary to a guardian, curator, administrator, or such other person, was *ipso jure* null [*Cens. For*. 1. 4. 12. 10].

Donation by minors or their guardians.

Minors, in fact, cannot donate to anybody, nor is it lawful even for their guardians to give away their property or to release a debt due to them [Grot. 3. 2. 7].

Donation to concubine and donation to induce illicit intercourse.

The Roman-Dutch law prohibition against donations to wives did not extend to donations to concubines. But a gift by a man to a woman to induce her to live in illicit intercourse with him or to continue to live in such intercourse, she being otherwise desirous to break it off, would be a contract *ex turpi causa*, and should be refused the support of the law. [*Parasatty Ammah v. Setupulle*, 3 N. L. R. 271. See same case in Ram. Rep. 1872–1876, 67].

Gifts to prostitutes and concubines.

Gifts to prostitutes are prohibited as dishonourable. Gifts to concubines as such *inter vivos* or by last will are revocable [*Cens. For*. 1. 4. 12. 11].

Donation of another's property invalid.

The donation of another's property is invalid, and the donor is not bound to warrant the property given [Grot. 3. 2. 5].

Where donor acquires title after gift.

Where a donor being entitled to only a share of a parcel of land purports to gift the whole land, and subsequently acquires title to the whole land, the title so acquired does not enure to the benefit of the donee [*Matthes v. Punchi Hami*, Wendt 122].

Donation of all one's property.

A donation *inter vivos* of all one's property present and future is not valid in law [Grot. 3. 2. 11; V. d. K. 487; *Cens. For*. 1. 4. 12. 13]. Some writers, however, assert that an unconditional gift of all property holds good even *inter vivos*. Under a gift of all property made unconditionally, however, future property is not included [*Cens. For*. 1. 4. 12. 14].

Donation may take effect after a certain time.

A donation may be made to take effect at once, or at a particular time, or to hold good up to a certain time, or it may be made conditionally [Grot. 3. 2. 13].

The donation being completed, the donor is bound to make delivery, and thus the acceptor acquires first the personal right to claim the ownership, and afterwards the ownership itself [Grot. 3. 2. 14].

When donation may be annulled owing to subsequent

A donation of all the donor's property or of a considerable part thereof, or of an article of very great value, made at a time when he had no children, nor saw any probability of ever having any, is annulled by the subsequent birth of children whom he leaves surviving, whether they be legitimate by birth or otherwise legitimated [Grot. 3. 2. 18].

Donation in contemplation of marriage.

A donation made in contemplation of marriage must be returned in case the marriage does not take place [Grot. 3. 2. 20].

Donations in fraud of creditors.

Registration.

Donations made in fraud of creditors are invalid, but it must be remembered that the prompt and regular registration of a deed of gift is a circumstance which shows that the gift was not fraudulently made [*Supremanian v. Gunewardene*, 3 N. L. R. 278].

It is a question whether the law allows a gift to children *en ventre* or not *en ventre* and unborn [*Dias v. Kaithan*, 2 N. L. R. 233].

Donations construed strictly.

All donations are construed strictly so as to burden the donor as little as possible [Grot. 3. 2. 21].

Acceptance by donee.

No donation is complete until accepted by the donee; but it is immaterial whether this acceptance be signified by the deed itself, or by letter, or in any other way, provided the intention clearly appears [V. d. L. 1. 15. 1.; Grot. 3. 2. 12; Vand. D. C. 168]. It may be signified by words or any other competent signs. It may also be effected by the agents of the parties. Before acceptance the obligation of the promissor does not take effect, if he revokes the promise or dies before it is accepted, unless a notary has accepted the promise for another subject to his approval [Grot. 3. 2. 12; *Tillekeratne v. Tennekoon*, Ram. 1843–1855, 155]. Where acceptance has not followed, the donor is at liberty to change his bare intention

[*Cens. For.* 1. 4. 12. 16]. Acceptance may take place not only by words but also by a nod and other signs as between persons who are present and consenting; as between people who are absent from each other, by letter, and it can take place by proxy. A notary or any one else cannot accept in the name of the donee without a special mandate; but unauthorised acceptance may be ratified by the donee. If he dies before such ratification, the power to ratify is not transferred to his heirs, but the gift lapses [*Cens. For.* 1. 4. 12. 16]. In the case of a written agreement the promise is held as sufficiently accepted by the acceptance of the document or acknowledgment of debt [Grot. 3. 5. 2]. As a rule, acceptance, as observed already, is necessary to render a donation complete. It may be fairly and reasonably presumed, where there are circumstances to justify the presumption [*Lokuhamy v. Juan*, Ram. Rep. 1872–1876, 215]. Where the donee is not *sui juris*, acceptance must be made by some one competent to act for him or her [Mor. Eng. and R.-D. Law, 101]. Acceptance may be by words, &c.

By the Roman-Dutch law the natural guardian of a minor was allowed to accept a gift on behalf of the latter [Voet 39. 5. 12].

A donation by a father to his son *in potestate* and accepted by the son, if he has attained puberty, or, if below infancy, by some public person, is valid [V. d. K. 485].

Where the execution of a donation is delayed until after the death of the donor, the donation can be accepted after the donor's death. It appears to have been so decided by the High Court of Mechlen [Grot. Tr. Herb. 285, n.]. Voet lays down the same proposition in 39. 5. 13. His words are—"*Et hæc ita, nisi executio donationis dilata sit post mortem donantis; quippe quo casu etiam post mortem ejus acceptatio non videtur donatario impedita.*" Acceptance after death of donee.

It is difficult to discover the correct signification of the word "*executio*" in this passage. It is a question whether it refers to a case in which the actual operation of the gift is delayed until the death of the donor, as for instance where he says that the property gifted shall vest in the donee after his, the donor's, death ; or to a case in which the donation is complete, except only that the donor has reserved to himself a life interest in the property donated. The Supreme Court has applied the passage in Voet to a case in which the latter state of things was disclosed [*Loku Hamy v. Juan*, Ram. Rep. for 1872, 1875, 1876, p. 215] ; but Barber and Macfadyen in their translation of the *Censura Forensis* say that where the "taking effect" of a deed of gift which has not been revoked has been postponed till after the death of the donor, it can be accepted even after the death of the donor [*Cens. For.* 1. 4. 12. 16].

Acceptance on behalf of an infant *in esse* or *en ventre sa mére.*

If the donation be to an infant *in esse*, or to a person *non compos*, the acceptance is to be made by the guardian or curator [Voet 39. 5. 12]. If the infant be in *ventre sa mére*, the acceptance is made on his behalf by the person under whose authority he will be placed on his birth [*Ibid.* See 2 B. 143].

Acceptance presumed from circumstances.

Acceptance by parents of donee.

The law favours the acceptance of gifts in the case of minors. The acceptance on the face of the deed by some person or other is not necessary. Acceptance will be presumed when there are circumstances to justify such presumption. Where, therefore, it was found that property gifted to minors had come into the possession of their parents, the presumption was that the parent entered into such possession on behalf of the children. If the interest and the duty of the parents were in conflict, the presumption was that they did their duty to their children. There was, therefore, in the circumstances, a sufficient acceptance of the gift

on behalf of the donees [*The Government Agent, Southern Province, v. Karolis*, 2 N. L. R. 72].

Acceptance by nephew of donee.

A deed of gift by a father in favour of certain of his minor children contained a clause that the deed, together with the donor's title deeds of the property gifted, was handed to the child first-named in the deed. The deed was in fact handed to a nephew of the donor who was present at its execution, and who immediately thereafter returned it to the donor for registration. The donor gave it back to him a month afterwards, and since then it remained in his possession, and it was held that the donor's nephew was not a competent person to accept the gift on behalf of the children, and that the deed was inoperative for want of a valid acceptance [*Fernando v. Cannangara*, 3 N. L. R. 6].

Gift by father to son not void.

A gift by a father to his minor son is not void, but there must be something which the law can recognise as an acceptance on his behalf. Where a father, after making the deed of gift, remained in possession of the property, managed it, and, while the donee was still a minor, revoked the deed of gift, such conduct cannot be regarded as an acceptance of the deed, even if a father can be at once donor and acceptor of the gift. The rule of law which requires acceptance by a competent person is based on the principle that a donation is a contract to which there must be two parties. A father making a donation cannot accept it on his child's behalf [*Wellappu v. Mudalihami*, 6 N. L. R. 233].

Donation is a contract, and hence donor cannot accept for donee.

Acceptance of deed is acceptance of gift.

The mere acceptance of the deed of donation is itself a sufficient compliance with the requirements of the law as to acceptance of the donation [*Per* Dias, J., in *De Silva v. Ondaatjee*, 1 S. C. R. 19]. Acceptance of a donation is mere matter of proof, and it is not necessary to allege it in a pleading as a link of title [*Ibid.*].

Acceptance need not be pleaded.

Donation to be accepted by *fidei commissarius.*

It has been held recently [see *De Silva v. Thomis Appu*, 7 N. L. R. 123] that in the case of a donation whereby the property gifted is made subject to a *fidei commissum*, the donation must be accepted by the *fidei commissarius* to render it effectual in his favour. Burge says, "The fidei commissary as well as the fiduciary donee must accept the donation [2 B. 148; Voet 39. 5. 43]. Where the latter is not yet *in esse*, possibly the rule laid down as to an infant [donee] in *ventre sa mère* [p. 530] may apply.

It has been considered by some jurists, says Burge, that it is competent to the public notary to accept the donation for the fidei commissary, but this opinion, he adds, has been controverted, and is opposed to the rule of law, *Alteri stipulari nemo potest*, and such a mode of acceptance was admitted only when the fidei commissary had subsequently ratified it. Unless, therefore, the fidei commissary had, by himself or another, accepted the donation, it was in many cases subject to revocation by the donor. The donor ceased, however, to retain the power of revocation, if the first donee was dead, having delivered the property to the fidei commissary. If the donor himself died before the period had arrived when the property was to be delivered to the fidei commissary, the power of revocation was at an end, and could not be exercised by the heirs of the donor [2 B. 149].

Under the Roman-Dutch law, in the case of donations of immovable property, it had to be judicially transferred and made over, and the duty of two and a half per cent. paid thereon. In like manner, with respect to property which in case of intestacy would descend to collaterals, the same duty was paid if passed by a *donatio inter vivos* [V. d. L. 1. 15. 1].

Effect of donation.

The effect of a valid donation is that the donee has an action against the donor to put him into possession of the thing given. The property in the thing

passes by delivery without, however, subjecting the donor to warranty [V. d. L. 1. 15. 1; *Cens. For.* 1. 4. 12. 19].

A donee is not to be preferred to a subsequent purchaser, without notice, of the property donated, if the latter was a creditor of the donor at the time of the donation [Vand. D. C. 193]. **Subsequent purchase of property gifted.**

Donations *inter vivos* are completed by tradition, or even without tradition, when the donor's intention to give and the donee's intention to receive have been clearly expressed, in which case the donee can compel tradition [*Ponasatty v. Settupulle*, 3 N. L. R. 271]. **Donee can compel tradition of property gifted.**

A donation by its nature is irrevocable. This irrevocability is, however, subject to some exceptions—(1) On the ground of gross ingratitude or misbehaviour, as, for instance, when the donee attempts the life of the donor or strikes him or attempts to ruin his estate. Malicious slander or any other injury gives the same right except to mothers who marry a second time. Causes of equal or greater weight are also held to have the same force; amongst others, the neglect of the donee, if he has the means, to maintain the donor in his utmost need [Grot. 3. 2. 17. See Vand. D. C. 144]. (2) When the donor of a gift of great value afterwards has children. (3) When the donation is of such magnitude that the children of the donor are thereby prejudiced in their legitimate portion. In this case, however, the gift is only held bad as far as regards the difference. When the donation is *mortis causa*, as it is termed, or under the apprehension of approaching death, it may at all times be reclaimed during the life of the donor [V. d. L. 1. 15. 1]. Even a gift to take effect after the lifetime of the donor is irrevocable [*Chinniah v. Vallipillai*, 4 N. L. R. 288]. **Donation irrevocable except for certain reasons.** **Gift to take effect after lifetime of donor.**

Van Leeuwen says a duly constituted gift can never be revoked by the donor, unless the donee has turned

Ingratitude of donee.

out to be ungrateful, as, for instance, when he has damaged the honour of the donor, has used personal violence towards him, or has made an attempt on his life, or has wasted his property, or has not observed the agreement or conditions attached to the gift [*Cens. For.* 1. 4. 12. 20]. In *Sansoni v. Foenander* [Ram. Rep. 1872–1876, 32] plaintiff by deed had gifted a house and premises to the defendant, her nephew, subject to right of enjoyment thereof during her [plaintiff's] life. The donee had been brought up and educated by the plaintiff, and had always lived with her in her house. The defendant, after the gift, systematically used foul and contumelious abuse and reproaches to the plaintiff, which made it impossible for her, as a decent and respectable woman, to remain in the house with him. The plaintiff having, in these circumstances, left the house, instituted an action to recover possession; and it was held that the plaintiff was entitled to revoke the gift in consequence of the use towards her of atrocious and contumelious reproaches by the donee.

Where children are born to donor after gift.

If after a gift of all his property or the greater part of it, or of an individual thing of very great value and worth, at a time when the donor had no children, children should be born to him, the gift is invalidated, for the condition, "unless the donor has children," seems to be tacitly included in a gift. It is usually left to the judgment and discretion of the judge to decide, considering the condition of both the donor and the donee and the other circumstances, whether it is likely that the donor would not have given a thing of such value, if he had thought of his children. Fruits gathered in the interval, however, whether they are still in existence or have been consumed, ought not to be restored, since the donee possesses them not merely *bonâ fide*, but also by right of ownership as long as the gift remains unrevoked [*Cens. For.* 1. 4. 12. 20].

A gift revoked in consequence of the subsequent birth of children does not, according to better opinion, revive or become valid again by the death of these children [*Cens. For.* 1. 4. 12. 21]. Revival of gift revoked by subsequent birth of children.

A remuneratory or reciprocal gift or a gift made in consideration of a marriage cannot be revoked on account of ingratitude or the subsequent birth of children. Indeed, the same may be said of any other gift made in consideration of something which has already been fulfilled, unless the gift exceeds the consideration [*Cens. For.* 1. 4. 12. 22]. Remuneratory or reciprocal gifts.

SUB-SECTION II.

Deposit or Bailment.

Definition.

Deposit is a contract whereby one person commits something to the care of another who charges himself gratuitously with the care of it under the obligation to restore it when demanded [V. d. L. 1. 15. 5; Grot. 3. 7. 2].

Deposit of key.

The thing deposited must be of a corporeal and movable nature, as this contract is not applicable to immovable property which cannot be removed from its place, and is therefore always to be found. If on going abroad we give the key of our house to a friend, this is a mere deposit of the key and of the furniture in the house to which access is had by this means, and not of the house itself. The nature of the contract requires—(1) A delivery of the thing given in deposit. (2) That the thing be given with the object of being kept in deposit. If given with any other object, it is another sort of contract. (3) That the deposit be undertaken gratuitously, for if any recompense be stipulated for the care, it becomes a contract of hire. (4) That the contracting parties be perfectly agreed, and mutually understand each other whether the agreement be declared verbally or by writing, expressly or tacitly [V. d. L. 1. 15. 5].

Requisites of contract.

Where thing is given by several persons.

If the thing is given by several persons, the depositors must all join in claiming delivery. If one alone claims, he must give the depositary security that he will not be further molested [Grot. 3. 7. 3]. It may be stipulated that the thing deposited is to be given to a third party who by accepting the same will acquire a right thereto [Grot. 3. 7. 4].

As to the necessity of undertaking the deposit gratuitously Grotins says that it sometimes happens that a person stipulates for some remuneration on account of the deposit, but this is alien to the nature of the contract, and the depositary is in such cases more stringently bound [Grot. 3. 7. 6].

Deposit must be undertaken gratuitously.

The thing deposited is to be returned in the same state in which it was received with all the fruits and profits that may have accrued therefrom [Grot. 3. 7. 7].

Return of deposit.

The depositary may not give back unasked the thing deposited except for very urgent reasons [Grot. 3. 7. 8].

If the thing is destroyed or damaged, the depositary is not liable for compensation, unless it happened through the fraud or gross negligence of the depositary, or unless he failed to take equal care of the deposit as he was accustomed to take of his own property [Grot. 3. 7. 9].

Destruction of thing deposited.

Where goods are deposited with another for safekeeping, whether the bailment is gratuitous [*depositum*], or for reward [*locatio operis faciendi*] the bailee is discharged from liability, if the goods be lost by housebreaking and robbery, and not through any want of reasonable care on his part [*Rodrigo v. De Mel*, Ram. Rep. 1872–1876, 9].

Theft of goods deposited.

A depositary who has not asked for the deposit is liable only for loss by *dolus* or *culpa lata* [Gren. 1873, Part II., p. 5].

Liability of depositary.

A person however who *offers* himself as depositary is liable for all kinds of negligence. A depositary is never liable for accident, unless he stipulated for payment on account of the deposit, or unless the accident happened after he, though duly warned, made delay in returning the property, or unless his liability had been expressly agreed upon [Grot. 3. 7. 10].

Liability for accident.

Deposit of stolen property.

Where stolen property is deposited with a person by the thief, the depositary may restore it to the true owner [Voet 1. 1. 5].

Right of retention.

A depositary may retain the thing deposited on account of necessary expenses, and a third party may for the purpose of securing a debt due to him arrest the deposit in the hands of the depositary [V. d. K. 533].

Actions on contract of deposit.

Two actions arise from this contract. The first lies to the party who has given the thing in deposit against the party who has received it or his heirs to compel the return of the deposit or for compensation for the damage occasioned to the thing by his fault or neglect [V. d. L. 1. 15. 5], The other action is given to him who has received the thing in deposit against the party who has given it or his heirs, for indemnification, as for instance, of all costs and charges that he has been put to and expenses necessarily incurred by him for the maintenance and preservation of the property deposited, and further for indemnification of all the damage occasioned by the thing without any fault on his part [V. d. L. 1. 15. 5; Grot. 3. 7. 11]. For obtaining this indemnification the depositary has the right to retain the thing until he is satisfied [V. d. L. 1. 15. 5; Grot. 3. 7. 11].

Sequestration and Consignation.

With the contract of deposit those of Sequestration and Consignation have great affinity [V. d. L. 1. 15. 6; Grot. 3. 7. 12]. Sequestration is the keeping of any goods concerning which there is any dispute in the hands of a third person either by agreement or by decree of the judge in order that when the dispute is terminated, the goods may be given over to the party who shall be declared entitled thereto. A judicial sequestration is when a person is placed by order of the judge over goods taken in arrest. It takes place also when an estate or inheritance, on account of debts, is abandoned by the heir to the creditors, or when an inheritance is left the heirs whereof are unknown [V. d. L. 1. 15. 6].

Consignation consists in the receiving and taking charge of money when the person really entitled to it is not yet ascertained. It is also used when a debtor does not choose to remain charged with money which his creditor will not or cannot receive, because an arrest has been laid on it, in the hands of the debtor by a third person. It is the practice also to bring into consignation or court the moneys produced by executorial sale of any immovable property which cannot be paid out until the several claims for preference thereon are decided [V. d. L. 1. 15. 6].

SUB-SECTION III.

COMMODATUM [LOAN OF USE].

Loan.

THE contract of Loan is of different natures according as it regards things which do or do not perish by use. The former is properly termed Loan or *Mutuum;* the latter, Commodate [V. d. L. 1. 15. 2].

Commodate.

When the loan was of such things as did not perish by use, it was termed *commodum* in the Roman Law. This is a contract whereby one party gratuitously delivers over to another a certain thing to use or enjoy for a limited time, and the other party who receives it binds himself to return it after he has used or enjoyed it for the time agreed upon [V. d. L. 1. 15. 4; Grot. 3. 9. 1].

What may be subject of commodate.

The thing lent may be anything that is an object of traffic or commerce, particularly movable property; but sometimes also immovable property may be the subject of this contract. Thus, I may lend to my friend a cellar or loft or chamber in my house. Things which are not allowed to be sold are also forbidden by law to be lent, such as prohibited books, &c. Things which consume or perish by use are also incompatible with the nature of this contract, unless they are lent not for consumption, but to serve as ornament or show [V. d. L. 1. 15. 4; Grot. 3. 9. 3].

The thing being lent only for a certain defined use, it must be strictly observed, or the party is guilty of a species of theft [V. d. L. 1. 15. 14; Grot. 3. 9. 5].

Obligations of borrower.

The receiver or borrower is bound to return the property lent together with all fruits and profits and in as good a condition as it was. If the thing perishes or is damaged by unavoidable accident, he will be free from liability, but he is more readily held liable for

negligence than a depositary, who merely receives something for the sake of another, and than a pawnee, who receives it as well for his own sake as that of another. A borrower receives a thing lent for his own sake alone, and is therefore bound to take the utmost care of it. Consequently, if he takes with him on a journey something lent to him at home and loses it by shipwreck or robbery, he is liable for compensation [Grot. 3. 9. 7].

Loss of thing lent.

Loss of the thing by means of irresistible violence also frees the borrower from liability. He must return the thing after the expiration of the time limited, or of such a time as is requisite for the use, to be defined by the judge when necessary. Sometimes the lending is simply until the owner requires it back [V. d. L. 1. 15. 4].

The borrower is bound to return the thing lent in the same state in which he borrowed it, unless prevented by irresistible violence or unavoidable misfortune. It is for him to show that the damage to the thing lent was not due to any fault of his own [*Wirakoon v. Jumeaux*, Ram. Rep. 1872–1876, 187].

Use must be gratuitous.

It is necessary that the use should be gratuitous; otherwise the contract is not *commodum*, but hiring or letting [*Ibid.*].

Liability for accident.

If the borrower has made delay in returning the thing, he is liable for accident also. He is also liable for accident, if such has been expressly stipulated or tacitly, as when the property has been appraised by mutual consent, and the borrower has bound himself to repayment of the appraised value [Grot. 3. 9. 8].

In an action for damages for the non-return of a bull loaned to the defendant, he pleaded that it was killed by a leopard while in his possession; and it was held that the plea was bad, unless it could be shown that the defendant had taken the utmost care of the animal, or that it was at the time of the accident under

the care of the plaintiff's servant [*Velaydan v. Geddes*, 2 S. C. R. 140].

Loan made for the benefit of both parties

Where the loan is made for the benefit of the lender or for the benefit of both parties, it would be rather out of the nature of an ordinary loan. In the former case the borrower is liable to the same extent as a depositary would be, and in the latter to the same extent as a pawnee [Grot. 3. 9. 9].

Liability of lender.

The lender is bound to allow the borrower the use for a stipulated time or for a reasonable time. He is also liable for compensation, if the borrower suffers any damage through some latent defect in the thing lent. He must also make good any large and necessary expenses, but ordinary daily expenses, such as feeding and keep of a borrowed horse, fall upon the borrower [Grot. 3. 9. 10].

Arrest of thing lent.

A *res commodata* may not be arrested by the commodatory or borrower in his own hands for any other debt than the expenses incurred in respect of it [V. d. K. 541]. Groenewegen [*ad. cod.* IV. 23. Ult.] and Voet [13. 6. 10] are of a different opinion.

Actions on contract.

From this contract arise two actions. The first is given to the lender against the borrower and his heirs to return the thing lent, or the value of it, in case it has become impossible to return it by his fault. Further, for compensation in damages occasioned by the destruction of the thing, or by not returning it in time; and finally for the delivery of all the fruits of the thing produced by it in the meantime [V. d. L. 1. 15. 4]. The other action lies for the borrower against the lender for damages, as in case the thing lent had some vice or defect known to the lender, which has occasioned damage to the borrower, or when he has been put to extraordinary cost and charges on account of the thing lent, or when the lender, or some one on his part, has impeded him in the free use of the thing [V. d. L. 1. 15. 4].

SUB-SECTION IV.

MUTUUM [LOAN OF THINGS CONSUMED BY USE].

LOAN, properly so called [*Mutuum*], is a contract whereby one of the parties gives over or delivers to the other the property or dominion of a certain sum of money, or quantity of things which perish by use, the latter binding himself to return as much of the same kind or species. It is of the essence of this contract that its subject-matter be either a sum of money or a quantity of a thing which perishes or is consumed by use, for example, grain, oil, wine, firewood, &c. Under this head may be classed all things whose quantity is determined by weight, measure, or number. [V. d. L. 1. 15. 2; Grot. 3. 10. 1]. *Mutuum.*

Mutuum is contracted not only by express words, but also tacitly by implication; so that when there is a doubt, *mutuum* is considered to have been contracted from the mere fact that mention has been made of money received. Similarly, where a large sum of money has been given to any one without mention being made of the reason, the presumption in case of doubt is that it has been given on loan for consumption [*Cens. For.* 1. 4. 4. 4]. *Mutuum* contracted expressly or tacitly.

The money or goods must be given over by the lender to the borrower, for without actual delivery this contract cannot exist. The property in the thing lent passes to the borrower. The lender therefore must be the proprietor or owner. The borrower is bound to return so much of the like quantity, however the price of the thing may in the meantime have risen or fallen. Both the contracting parties must mutually agree and be of accord on all these points [V. d. L. 1. 15. 2]. Actual delivery of the thing itself is, however, not Delivery necessary. Property in thing lent.

Actual delivery not necessary.

always necessary. There may be a bare cession of a thing already delivered, or to be delivered by another, as, for instance, where A agrees with B that what the latter owes the former on the footing of mandate may be retained by him as a loan [*Cens. For.* 1. 4. 4. 4].

Loan of another's property.

This description of loan cannot take place with respect to another's property except through one who had the management of it for that purpose [Grot. 3. 10. 2].

Thing should be capable of measurement.

The thing should be capable of being measured, counted, or weighed; otherwise, the transaction would be barter [Grot. 3. 10.3]. If the thing is already in the hands of the person who is to receive it in *mutuum*, the consent of the owner for retention as a *mutuum* is sufficient to constitute the contract [Grot. 3. 10. 4].

Minors cannot make *mutuum*.

Minors are incompetent to make a legally valid *mutuum*. So, whatever has been handed over by minors may be recovered by a real action, and if it has been consumed by the receiver, the matter will for the benefit of the giver be interpreted as though the *mutuum* was effected [Grot. 3. 10. 5].

Time for return.

The thing should be given to be returned afterwards, that is, at a stipulated time; for, if one receives money in order immediately to receive other money in return, it is not *mutuum* but exchange [Grot. 3. 10. 6].

Exchange.

Return in other coin.

Borrowed money may be returned in another description of coin, unless it is very clearly proved that both contracting parties had regard not to the value, but to a particular description of coin [Grot. 3. 10. 7].

Money lent to carry on trade.

It may here be noted that the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender should receive a rate of interest varying with the profits, or should receive a share of the profits arising from carrying on such trade or undertaking, does not of itself constitute the lender

a partner with the person carrying on such trade or undertaking, or render him responsible as such [Ord. No. 21 of 1866, sect. 3]. But in the event of the trader being declared an insolvent or entering into an arrangement to pay his creditors less than twenty shillings in the pound or dying in insolvent circumstances, the lender is not entitled to recover any portion of the profits or interest payable in respect of such loan, until the claims of the other creditors for valuable consideration have been satisfied [sect. 7].

Lender's rights when trader becomes insolvent.

From this contract which is unilateral arises an action to the lender or his heirs against the borrower or his heirs to return a like sum of money or quantity of the thing lent, and of the same quality, and this after the expiration of the time limited by the contract, or if no time has been fixed, then after a reasonable time to be determined by the judge [V. d. L. 1. 15. 2].

Action on contract.

In loans, especially of money, interest is very frequently stipulated [Grot. 3. 10. 9 *et seq.*]. Under the Roman-Dutch law interest was not to exceed 6 per cent. To stipulate for more was held to be usury and punishable [V. d. L. 1. 15. 3; Grot. 3. 10. 9. See *Cens. For.* 1. 4. 4. 9].

Interest.

Interest was sometimes payable without any covenant to that effect on the ground of neglect or delay in paying the principal [*Cens. For.* 1. 4. 4. 12; V. d. L. 1. 15. 3].

When the payment of the debt was fixed at a day certain, then interest ran from that day; but if no day was fixed, then it ran from the day the lender brought his action at law. This interest, however, unless otherwise stipulated, was not reckoned at more than four *per cent.* [V. d. L. 1. 15. 3]. The amount of interest must not exceed the principal; and interest upon interest was not allowed, nor could interest be turned into principal so as to increase the original debt [V. d. L. 1. 15. 3; V. d. K. 548].

Loan payable on a particular date.

In the case of loans of money the debtor cannot without the consent of the creditor pay the principal before the time agreed upon, and thus discharge himself from his liability to pay interest [V. d. K. 542].

Interest may be recovered as stipulated or at nine per cent., but is not to exceed principal.

Ordinance No. 5 of 1852, which introduces into this colony the Law of England in certain cases, provides as follows—"Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby, or from recovering interest at the rate of nine per cent. per annum on any contract or engagement, or in any case in which interest is payable by law, and no different rate of interest has been specially agreed upon between the parties; but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal [sect. 3].

Profits on usufructuary mortgage not to exceed principal.

A plaintiff suing on a usufructuary mortgage cannot recover a larger sum than the principal, whether as interest, *nominatim*, or as profits of the mortgaged property not enjoyed [*Seneviratne v. Bastian*, Ram. 1843, 154].

Interest may exceed principal, if paid from time to time.

Where interest is paid from time to time there is no limit to the amount which may be recovered as interest. The amount already paid may exceed the principal. Still, the creditor is entitled to recover a sum equal to the principal as interest [*Coomarevelo v. Sittarapuwalpillai*, 4 S. C. C. 28; *Sidenberenada v. Sangarapulle*, Ram. 1843–1855, 19].

Dutch law against usury not in force in Ceylon.

There is nothing in the laws of this colony which restricted the rate of interest recoverable at law to twelve per cent. only [*Peria Carpen v. Herft*, 7 S. C. C. 182]. The Dutch Laws against usury are not in force here [*Coomaravaley v. Sitterapuwalpillai*, 4 S. C. C. 28]. In *Pulle v. Cando* [Ram. Rep. 1872–1876, 189] it was held by a majority of the court that the usury laws of Holland, being in their nature merely

local enactments and unsuited to the condition of affairs in Ceylon, were not introduced by the Dutch, and were not in force during their occupation of the Island, and that, therefore, any rate of interest stipulated for could be recovered.

No interest on claim for goods sold, &c.

No interest on claims for goods sold and accounts stated is allowed in the absence of specific agreement to pay interest [*Ahamat v. Martinus*, Wendt 341].

Compound interest not allowed.

Compound interest, that is, interest upon interest, is not allowed [Vand. D. C. 57] even though expressly stipulated for [*Pulle v. Tamby Cando*, Ram. Rep. 1872-1876, 189. See *Cens. For.* 1. 4. 4. 27].

Interest at enhanced rate on default allowed.

Payment of a higher rate of interest on default of payment of a debt on its due date may be enforced, if the amount demanded is not outrageously out of proportion to any possible loss that could accrue to the creditor. The rule which is acted upon by English Courts of Equity, that the court will not enforce a stipulation for payment of an increased rate of interest in a case where the debtor is not punctual in paying the interest originally stipulated, does not prevail in Ceylon [*Kailasem v. Fernando*, 2 Br. 87].

Enhanced interest is not penalty

Enhanced interest is not to be looked at in the light of a penalty [see I. L. R. 2, Mad. 205; 22 W. R. 223; I. L. R. 6 All. 64].

SUB-SECTION V.

MANDATE.

Mandate.

THE contract of Mandate takes place when one man commits to another the care and management of one or more of his affairs for his account and in his stead, and the latter charges himself therewith gratuitously, and binds himself duly to account and answer [V. d. L. 1. 15. 14].

The doing of a thing for and on account of a third person may also be the subject of mandate [Grot. 3. 12. 2].

The thing to be done or executed must not be contrary to the law, natural or municipal, [Grot. 8. 12. 3] or *contra bonos mores*, nor altogether of such an indefinite nature as to be quite uncertain, nor of such a nature as to render it unfit to be executed by the principal himself; and further it must be of such a nature as not to be unfit to be executed by such a person as the person who is charged with it; and it is necessary that the mandator or principal or some third person have some interest in it [V. d. L. 1. 15. 14].

Difference between mandate and recommendation.

It must be the intention of the mandator and mandatory, or of the person who gives and of him who accepts the charge, to bind each other reciprocally without regard to the way in which the agreement is made, whether verbally, by letter, or regular power of attorney. Here a clear distinction must be made between mandate and simple recommendation or advice to do a thing, which latter raises no obligation, unless coupled with fraud [V. d. L. 1. 15. 14].

Business must be undertaken gratuitously.

The business undertaken must be done gratuitously; otherwise, it is a contract of hire of service. However, it is not contrary to the nature of mandate for the

mandatory to receive some recompense or honorary remuneration for his service [V. d. L. 1. 15. 14].

Remuneration not being altogether repugnant to the nature of Mandate or Commission, may be recovered not only where it has been promised, but even where it has not been promised, provided the act or service done be such as it is usual to give remuneration for [V. d. K. 570].

Mandate and Agency.

The contract of *mandatum* occupies a small space in English law compared to what it occupies in Dutch law. The contract of agency in English law is in many respects to be compared to mandate. In fact, the English contractual relation called agency includes the Dutch mandate or gratuitous agency and agency for payment or commercial agency which fell under *locatio conductio* [*locatio operarum*] in Roman law. Although mandate has much in common with agency, yet *mandatum* in the primitive sense of the term was not so much a contract from which there sprang up a civil obligation and action, as a business or negotiation which was confined to the discretion of the mandatory [Mor. Eng. and R.-D. Law, 193]. On account of the inadequate treatment of agency by Dutch writers, the English law on the subject has been practically taken over *en bloc* in South Africa. The law of England with respect to Principals and Agents was introduced into Ceylon by Ordinance No. 22 of 1866 [see Vol. I., p. 7].

Agent remunerated from profits of trade.

It may here be mentioned that no contract for the remuneration of a servant or agent or any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, of itself, renders such servant or agent responsible as a partner therein, nor does it give him the rights of a partner [Ord. No. 21 of 1866, sect. 4].

General and special attorneys.

A power of attorney is an ordinary form of mandate. Attorneys are general or special.

The former are for all things, the latter for special things. A general attorney again is appointed either with "free administration" or "simply." In the former case he can do almost all his principal can do, *e.g.*, alienate goods, &c. He cannot, however, donate his principal's property; that is, he may administer his principal's affairs, but cannot deliberately cause him loss. In the latter case he cannot alienate property, except fruits and other perishables, without a special power [Voet 3. 3. 7].

Attorney *in rem suam.*

An attorney *in rem suam* is one who acts for his own benefit and not for his principal's. This usually happens in the case of a cession of action, when the person to whom cession is made becomes plaintiff *in rem suam*. One may put himself forward as defendant in place of another as when he, being liable to do so, is called upon to defend an action in place of another. But, as to actual substitution of parties to an action, while one plaintiff may be substituted for another without the defendant's consent and even against his wish, one defendant cannot be so substituted for another [Voet 3. 3. 8]. The mandate to an attorney *in rem suam* cannot be revoked [Voet 3. 3. 23].

Registration of Powers of Attorney.

Ordinance No. 4 of 1902 makes provision for the registration of Written Authorities and Powers of Attorney; and the latter, whether executed in Ceylon or elsewhere, must here usually be stamped with a stamp of five rupees [Ord. No. 3 of 1890].

Minors as attorneys. Women may hold general powers.

Minors over seventeen may be attorneys and agents for others [Voet 3. 3. 6]; and a woman may legally hold a general power of attorney with free power of administration. She may thus carry on suits, recover money, &c., provided only she appoints a court attorney to do court work. A wife can thus sue as the agent of her husband [Voet 3. 3. 4]. Voet inclines to the opinion that a married woman may without the consent

of her husband be appointed by a third person as attorney to carry on a suit [Voet 3. 3. 5].

Infant may be attorney.

An infant may be authorised to act as agent, and may validly exercise a mandate committed to him [*Andrews v. Andrews*, L. R. 15 Ch. D. 228 ; 2 C. R. C. 281].

Substitution of attorney to carry on suit.

An attorney at law appointed to carry on a suit has the power of substitution, although it is not expressly given by the mandate. It is, however, safer that the mandate should contain such power [Voet 3. 3. 2].

An attorney at law who acts in a suit of original jurisdiction may, if authorised by his mandate, appoint an attorney to act in the same suit in appeal [Voet 3. 3. 18].

Women cannot be attorneys at law.

Women are incapacitated from being attorneys at law [Voet 3. 3. 4].

Delegation of power by attorney.

Whether an attorney appointed to conduct business can appoint an attorney at law depends on the terms of his mandate. If the mandate is limited, so is his right of substitution [Voet 3. 3. 3].

Authority to agent to execute notarial instrument.

It was held in *Dias v. Fernando* [8 S. C. C. 182] that the authority to an agent to execute an instrument required by Ordinance No. 7 of 1840 to be notarial must itself be contained in a notarial instrument ; but in a later case [*Saibo v. Silva*, 4 N. L. R. 229] this decision was not acted upon by the Supreme Court, and it was there held that a notarial conveyance of land was not void, because the person who purported to sign it for his principal was not authorised thereto by a notarial power of attorney [see also *Grey & Co. v. Arabin*, Ram. 1843–1855, 164].

Under the English law, to maintain an action upon a deed executed by an agent, it must appear that the agent was authorised by deed. But, except in cases where a personal signature is necessary by reason of some statutory or other prescribed requirement, an agent authorised in any way may bind his principal by a written instrument not being a deed [*Berkeley v.*

Hardy, 3 Barn. & Cress. 355; *In re Whitley Partners, Lt.*, 55 L. J. Ch. 540; 2 C. R. C. 273]. A Power of Attorney to execute a deed under seal must itself be under seal. But subsequent informal acts of the principal showing his adoption of the deed are regarded as equivalent to due execution by him [*Steiglitz v. Egginton*, Holt N. P. 141; *Tupper v. Foulkes*, 30 L. J. C. P. 215; 8 C. R. C. 622].

Power of attorney to execute deed under seal.

Attorneys appointed to act jointly.

Where two or more attorneys are appointed to act jointly, one only cannot represent the principal [*Mudianse v. Mohamado*, 2 Br. 145; *Muttiah v. Karupaya*, 6 N. L. R. 285, 306].

Agents of Chetty firms.

It is the custom among Natukotta Chetties of South India, who carry on trade in Ceylon, to describe themselves by the names of the individuals who constitute the firm, and to prefix to each name the initial letters of the firm. Their agents when signing for their principals usually sign their own names prefixing to them the initial letters of the firm for which they act. If an agent signs on his own account, he signs his own name, and prefixes to it the initial letters of his own patronymic. Thus, N. V. Muttiah Chetty being appointed agent of the firm of P. L. [Payna Leyna] would, when signing for the firm, sign himself "P. L. Muttiah Chetty." So, a bond given to "P. L. Muttiah Chetty" would not be a bond given to Muttiah Chetty in his private capacity, but one given to him as agent of the firm of "Payna Leyna" [*Pattachi Chetty v. Yosoof*, 6 N. L. R. 152]. Similarly, "A. R. S. V. R. Muttu Ramen Chetty" would mean the firm of A. R. S. V. R. by their attorney or agent or representative, Muttu Ramen Chetty [*Meyappa v. Usoof*, 5 N. L. R. 265; 2 Br. 394. See also 4 S. C. C. 91, 69, and 111; 3 S. C. C. 136; 7 S. C. C. 89; 8 S. C. C. 107].

Authority to sign promissory notes.

An authority to an agent to borrow money does not include an authority to sign promissory notes [*Muttiah v. Karupaiya*, 6 N. L. R. 306].

The act of a person purporting to act, without proper authority, as the agent of another may be ratified and confirmed by the latter. So, where A purporting to act on behalf of B, the holder of a mortgage from C, transferred the mortgage to D; and after action on the bond by D, B ratified and confirmed the transfer, it was held that the ratification and confirmation related back to the transfer, and supported the action [*Mohamado v. Mohamado*, 9 S. C. C. 114]. Ratification of act of person purporting to act as agent.

The mandatory is bound to fulfil the mandate, and that according to the directions of the mandator without deviating from them in any way, unless indeed he does something clearly equivalent to what he has been directed to do. If he acts otherwise, he will be liable to make compensation for all losses under which loss of profits is included. He is also bound to hand over to the mandator all fruits and profits accruing in any way from the subject of the mandate, and to cede to him all personal claims he may have acquired [Grot. 3. 12. 8; V. d. L. 1. 15. 14]. Duties of mandatory.

The mandator is bound to indemnify the mandatory for all reasonable expenses incurred and damage suffered on account of the mandate, even though the mandatory may have been prevented by some obstacle or other from completing the mandate. Even before executing the mandate the mandatory may claim to have the necessary expenses advanced. Even if another could have executed the mandate more cheaply, the expenses *bonâ fide* incurred by the mandatory must nevertheless be made good to him, seeing that he is not benefited by the transaction [Grot. 3. 12. 9]. Liabilities of mandator.

The mandatory is not entitled to be reimbursed in respect of costs occasioned by his own fault or negligence. The mandator must guarantee him against all obligations and engagements which he has been obliged to enter into on account of the charge, provided that in

these the mandatory has not exceeded the due limits [V. d. L. 1. 15. 14].

Actions on contract.

For the enforcement of these reciprocal obligations, the law has given to both parties the necessary actions [V. d. L. 1. 15. 14].

Where mandatory to buy for a certain price buys for less.

If a mandatory who has been directed to buy something for a certain price buys it for less, the benefit goes to the mandator. If he buys it for more, he can only recover to the extent of his mandate [Grot. 3. 12. 10].

Death of either party.

If either of the parties dies, the mandate is generally at an end, unless the intention were clearly otherwise, or unless the matter had clearly been taken in hand by the deceased mandatory, and is proceeded with by his heir [Grot. 3. 12. 11].

Revocation and surrender of mandate.

The mandator may in his life time revoke his mandate, while the matter is still intact. So also the mandatory may give up the mandate, if it can be properly worked out by another, but not otherwise, unless he has been prevented by something of importance from giving it up sooner, or does so now on the ground of ill-health or of unexpected difficulties arising in the matter, or some such reasonable grounds [Grot. 3. 13. 12].

When mandate is irrevocable.

Where an authority is given to secure some benefit to the donee of the authority, and this is done upon consideration moving from that donee, the authority is said to be "an authority coupled with an interest" [*mandatum in rem suam*]; and an agreement is implied whereby the authority is irrevocable [*Gaussen v. Morton*, 10 Barn. and Cress. 731; 16 C. R. C. 797].

Alteration in affairs of mandator.

Mandate is also determined by such alteration in the condition or affairs of the mandator that he has no longer *legitimam personam standi in judicio* or the right to sue [V. d. L. 1. 15. 14].

Revocation of mandate.

A prior general mandate is not revoked by a subsequent special mandate. If a power is given to one person and then the same power to another, the latter is a revocation of the former [Voet 3. 3. 24].

SUB-SECTION VI.

PURCHASE AND SALE.

THE law as to the sale of "goods" as defined in Ordinance No. 11 of 1896 being practically the English law, on which there are comprehensive text books available, is not treated on under this title, except so much of it as is applicable, exclusively or cumulatively, to the subject of the purchase and sale of other property. As to bills of sale of movable property and assignments thereof, see Ordinance No. 8 of 1871 [p. 433 *supra*].

Purchase and sale is a contract whereby one person binds himself to make over to another, and warrant to him the ownership in a certain thing for a certain fixed price [Grot. 3. 14. 1 ; V. d. L. 1. 15. 8]. Definition.

There are therefore three things essential to the contract of sale. The thing to be sold, a price to be agreed on, and the mutual consent of the parties [V. d. L. 1. 15. 8]. Essentials of contract.

Purchase and sale was under the Roman-Dutch law contracted either in writing or without writing [Grot. 3. 14. 26]. How contracted.

In Ceylon no sale, purchase, transfer, assignment or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property, other than a lease at will, or for any period not exceeding one month, nor any contract or agreement for the future sale or purchase of any land or other immovable property, is of force or avail in law, unless the same is in writing and signed by the party making the same or by some person lawfully authorised Sales, &c., of land to be in writing.

by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument is duly attested by such notary and witnesses [Ord. No. 7 of 1840, sect. 2].

Difference between this section and the English Act.

While this provision makes parol agreements of no force or avail in law, the English Act provides that "no action shall be brought," &c., on such agreements. Under the English Act it has been held that while there is no legal obligation to do a thing in future in the absence of a writing, yet, if one has, in fact, enjoyed all the advantages of an agreement, that forms a moral obligation sufficient to support a promise notwithstanding the statute. Without going the length of deciding that in Ceylon every part performance took the case out of the Ordinance, the Supreme Court held in the case of *Perera v. Fernando* [Ram. 1863–1868, p. 83] than an owner of any land could in Ceylon recover for use and occupation of the land without a notarial instrument, if there had been actual use and occupation.

It is essential to the validity of a deed affecting immovable property in Ceylon that it should be executed in the Island [Ram. 1860–1862, p. 37].

Delivery of deed of conveyance.

A sale of land would be incomplete for want of delivery of the deed and payment of consideration [Vand. D. C. 244]. Under the English law a deed, to be operative, requires delivery; in fact, a sealed writing is not a deed until it is delivered [*Tupper v. Foulkes*, 9 C. B. N. S. 797; 30 L. J. C. P. 214; *Per Bovill, C. J.*, in *Reg. v. Norton*, L. R. 2. Ch. 22. 27].

Agreement to possess land mortgaged in lieu of interest should be in writing.

An agreement that the creditor on a bond should possess the land mortgaged in lieu of interest is of no force, unless it is notarially executed. Possession under such an agreement, if entered into verbally, could not be pleaded in bar of prescription [*Mudianse v. Mudianse*, 2 N. L. R. 86].

The following are among the more important decisions of the Supreme Court under this section— Summary of decisions.

Where a grantor had executed two deeds, and it appeared that at the time of signature he was too ill to use the pen, and that he signed by a cross, his hand being guided by the notary, who also attested the deeds, it was held that this execution was sufficient, and that in the circumstances the notary was a competent witness to the signature to satisfy this section of the Ordinance, even assuming that he was the grantor's agent for signing the two deeds [*Menica v. Dingiria*, 2 S. C. C. 169]. Execution of deed by a cross, hand being guided by notary.

The effect of this section when read in connection with sub-section 5 of section 21 of Ordinance No. 16 of 1852 is to require the attesting witnesses to a notarial deed of gift to subscribe their signatures in the presence of one another and of the grantor and notary. This mode of attestation is essential to the validity of the deed [*Pnnchi Baba v. Ekenaike*, 4 S. C. C. 119]. Deed should be signed by person executing, notary, and witnesses in the presence of one another.

The authority to an agent to execute an instrument required by the Ordinance to be notarial must itself be contained in a notarial instrument [*Dias v. Fernando*, 8. S. C. C. 182]. But see, *contra*, *Grey & Co. v. Arabin* [Ram. 1843–1855, p. 164] and *Meera Saibo v. Paulu Silva* [4 N. L. R. 229]. Authority to agent to execute a deed requiring notarial attestation.

As regards contracts affecting crops and vegetation generally, a distinction has to be drawn between *fructus naturales* and *fructus industriales*. The former expression applies to trees which principally draw their nourishment from the soil, any extra aid which they receive from the industry of man being very slight compared with the nourishment which they receive from the soil. So, a contract to permit cinchona which is *fructus naturales* to be harvested is a contract establishing an interest affecting land, and as such requires notarial execution [*Lee Hedges & Co. v. Seville*. 8 S. C. C. 21]. *Fructus naturales* and *fructus industriales*. Contract to harvest cinchona.

Possession of trees.

Possession of trees standing on another man's land involves an interest in immovable property, but when the nuts are picked, the crop becomes movable property [*Romel v. Moises*, 4 N. L. R. 225]. A tobacco crop is *fructus industriales*, and is not an interest in land requiring that any agreement respecting it should be notarial [*Perera v. Ponnatchi*, 3 N. L. R. 56]. Crops of paddy and chillies grown on chena land are *fructus industriales*, and are presumably the property of the persons in possession of the land who had raised them [*De Silva v. Wasanahami*, 3 S. C. C. 80].

Tobacco crop.

Paddy and chilly on chena land.

Growing crop of coffee.

A parol agreement giving a right to an interest in a growing crop of coffee for an entire season is void under Ordinance No. 7 of 1840 [3 Lor. 284 ; *Perera v. Mudalihami*, Ram. 1863–1868, p. 123]; but an agreement to deliver at certain specified rates all the crop of a certain year of a cinnamon estate is not an agreement involving an interest in land to require a writing under Ordinance No. 7 of 1840 [*Wall v. Schrader*, Ram. 1863–1868, 284].

Agreement to deliver all the crop of a cinnamon estate for one year.

"Anda" cultivation.

It has been held [over-ruling the judgment in *Elias v. Jeronis*, 7 S. C. C. 71] that an agreement between parties for the cultivation of land in "anda" is a contract or agreement for establishing an interest affecting land which requires notarial execution [*Saytoo v. Kalinguwa*, 8 S. C. C. 67].

Planter's share.

A "planter's share" is an interest in land, and cannot be acquired by the planter except by means of a notarial instrument or prescriptive possession [*Jayasuriya v. Omer Lebbe*, 2 C. L. R. 6] ; and, similarly, a contract by which one person agrees to improve and cultivate land in consideration of a promise by another to give him a lease thereof must be notarial [Gren. 1873, Part II. 42]. But where by custom a planter is entitled to a certain share of the plants at maturity, no notarial contract is necessary to entitle him to recover [3 Lor. 275].

Contract to improve and cultivate land.

Money paid in pursuance of a contract which is void for non-compliance with the provisions of section 2 of Ordinance No. 7 of 1840, and which is not performed, is recoverable by action [Gren. 1873, Part II. 34; *Grigoris v. Tillekeratne*, 2 C. L. R. 191]; and a person declared the highest bidder at an auction sale of land may recover a payment made under conditions of sale not notarially attested [3 Lor. 175].

Money paid on invalid agreement.

Conditions of sale at public auction.

Where one party to an agreement is guilty of fraud, he is not to be allowed to seek shelter behind the Ordinance, and reap the fruit of his own misconduct. So where plaintiff and defendant entered into a verbal agreement that the defendant should bid at a Fiscal's sale of land, and, after getting the Fiscal's transfer, convey the land to the plaintiff, and the defendant having obtained the transfer fraudulently refused to execute a conveyance, and sought to keep the land for himself. the plaintiff was allowed to lead parol evidence of the agreement [Gren. 1873, Part III. 39]; and in *Siman v. Saelo* [3 S. C. C. 103] plaintiff and defendant arranged between themselves to purchase jointly a share of Crown land sold at a Government sale, contributing the purchase money in equal shares. Defendant acted as the agent of the plaintiff in negotiating the purchase, and the plaintiff paid his contribution into his hands, and he bid at the sale. The conveyance from the Crown was afterwards made out in the name of the defendant only, after which the defendant fraudulently refused to allow the plaintiff to have any share, and upon the plaintiff suing him, and praying that he might be ordered to convey to the plaintiff his proportionate share of what had been conveyed by the Crown grant, the defendant set up the Ordinance of Frauds, but decree was entered that he should convey as prayed in the libel [See also *Godinho v. Perera*, Ram. 1860, 6]. In *Silva v. Ranmenika* [5 N. L. R. 188] the facts were similar. There the plaintiff brought an action for the recovery of land

Fraud on the part of one party.

alleged to have been bought by B for the plaintiff and to have been possessed by the plaintiff from the date of such purchase until the ouster by the defendant who claimed under B; and it was held that, in the absence of an allegation of fraud or mistake on the part of B, it was not possible to set up a parol agreement between him and the plaintiff for the purpose of establishing an interest in land. Similarly, where a resulting trust in real property purporting to be in the name of A was sought to be established in favour of B by parol evidence that the purchase money of such property had been found by B's deceased father while trading in partnership with A, it was held that, in the absence of any allegation of fraud, such evidence was inadmissable, as it had the effect of varying the terms of the deed of purchase [Ram. 1877, 156. See further *Nachiar v. Fernando*, 5 N. L. R. 56; 2 Br. 390].

Resulting trust.

To establish an implied, or resulting or constructive, trust, parol evidence may be admitted without violating the Ordinance of Frauds; and where a transaction is intended to effect a fraud, parol evidence is at all times admissible to establish a resulting or constructive trust [*Saibo v. The Oriental Bank Corporation*, 3 N. L. R. 148].

No writing, deed, or instrument for the purposes aforesaid made prior to the passing of the Ordinance can be deemed or taken to be invalid by reason alone of the same not having been executed and acknowledged before or attested by a notary licensed to practise within the district wherein the land or property affected by such writing, deed, or instrument is situated; provided that every such writing, deed, or instrument has been duly executed or acknowledged before or attested by a notary licensed to practise in some other district [sect. 14]. All deeds and other instruments are required to be executed in duplicate [sect. 15].

These provisions do not apply to grants, sales, or other conveyances of land or other immovable property from or to Government, or to any mortgage of land or other immovable property made to Government, or to any deed or instrument touching land or other immovable property to which Government is a party, or any certificates of sales granted by Fiscals for land or other immovable property sold under writs of execution [sect. 20]. Exception in favour of Government grants, &c.

Every writing, deed, or instrument required as above to be executed before a notary and two witnesses may be executed before two witnesses and some District Judge or Commissioner of a Court of Requests for the district in which the party making such writing, deed, or instrument or the person signing the same as attorney resides, or some Justice of the Peace for such district specially authorised by the Governor to act in that behalf and of whose appointment notice has been given in the *Government Gazette* [Ord. No. 17 of 1852, sect. 1]; provided that every such writing, deed, or instrument is executed in duplicate, and the duplicate is forthwith delivered or transmitted by the Judge, Commissioner, or Justice of the Peace to the secretary of the proper District Court to be by him registered, and preserved in the court in like manner as notarial deeds of a similar description [sect. 2]. Deed may be executed before District Judge, &c.

The provisions of section 2 of Ordinance No. 7 of 1840 do not apply, at places at which Ordinance No. 21 of 1887 has been proclaimed, to contracts or agreements for the cultivation of paddy fields or chena lands for any period not exceeding twelve months, if the consideration for these contracts or agreements is that the cultivator should give to the owner of such fields or lands any share or shares of the crop or produce thereof [Ord. No. 12 of 1840, sect. 1]. Agreements for cultivation of paddy fields.

It may here be mentioned that every deed or other instrument of sale, purchase, transfer, assignment, or Registration of deeds.

mortgage of any land or other immovable property, or of promise, bargain, contract, or agreement for effecting any such object, or for establishing or transferring any security, interest, or incumbrance affecting such land or property, other than a lease at will, or for any period not exceeding one month, or of contract or agreement for the future sale or purchase or transfer of any such land or property, and every deed or act of release, surrender, or annulment of or affecting any such deed or other instrument, and the probate of any will, and every grant of administration affecting any such land or property, and every payment or order of court affecting any such land or other property should be duly registered [Ord. No. 5 of 1877, sect. 16].

Effect of non-registration.

Every deed, judgment, order, or other instrument as aforesaid, unless so registered, is void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed, judgment, order, or other instrument which has been duly registered as aforesaid. Fraud or collusion in obtaining such last-mentioned deed, judgment, order, or other instrument, or in securing such prior registration, however, defeats the priority of the person claiming thereunder. Nothing in the Ordinance is to be deemed to give any greater effect or different construction to any deed, judgment, order, or other instrument registered in pursuance thereof save the priority conferred on it as aforesaid [Ord. No. 5 of 1877, sect. 17].

Registration of seizure.

The Civil Procedure Code makes provision [sect. 237] for the registration of seizures [in execution] of immovable property; and section 238 provides as follows—"When a seizure of immovable property has been effected, and made known and registered as in the last preceding section provided, any private alienation of the property seized, whether by sale, gift, mortgage,

lease, or otherwise, after the seizure and before the removal of the same, or the sale and conveyance of the property by the Fiscal, shall be void as against all claims enforceable under the seizure." The scope of this section is not so wide as that of section 17 of Ordinance No. 5 of 1877 quoted above. Clearly, its effect is not to give a seizure priority, by reason of prior registration, over deeds executed before the seizure; but the question arises whether an alienation effected after the seizure but before the registration of the seizure is void as against all claims enforceable under it. The words of the section would seem to justify the inference that it is, because the section speaks of private alienation "after the seizure," no mention being made here of registration. So that the section bears the construction that alienation, after seizure only, becomes void the moment the seizure is made known and registered. This, however, could hardly be said to have been the intention of the Legislature. Registration of a seizure is manifestly intended as notice to the public of the seizure, and the provision in the Code is aimed against private alienation after such notice; and it may therefore be safely assumed that it is only an alienation made after the "seizure is effected, made known, and registered" that is void as against claims enforceable under the seizure; and that therefore an alienation made after the seizure, but before the registration of the seizure, is not defeated by the subsequent registration of the seizure, unless, perhaps, the party alienating can be shown to have taken dishonest advantage of the time allowed by section 237 of the Code to the Registrar of Lands to register seizures, and can thus or otherwise be said to be guilty of fraud.

Are alienations after seizure but before its registration void?

The following are among the more important judgments of the Supreme Court on the subject of Registration of Deeds—

Summary of decisions.

Not fraud to take a conveyance and register it with knowledge of a subsisting conveyance.

It is not fraud within the meaning of section 39 of the Ordinance, if, with notice of a conveyance already made for value, a second purchaser takes a conveyance to himself also for value, and registers it before the former conveyance [*Siripina v. Tikeria*, 1 S. C. C. 84. See also *Goonesekere v. Goonetileke*, 2 Br. 399].

Registration does not relate to date of instrument.

The registration of an instrument or decree does not relate back to the date of the instrument or decree, and operate before the date of registration [*Simon v. Usubu Lebbe*, 2 S. C. R. 113].

Registration should be pleaded.

In order to entitle a party to rely on the priority conferred by the Ordinance, it is necessary that prior registration should be specially pleaded by him [*Sabu v. Sirimale*, 2 C. L. R. 146].

Notice of deed not to be presumed by registration.

Although the object of registration is to give notice of the deed registered to the public, notice of a deed is not always to be presumed from the mere fact of its registration [*Wairamuttu v. Ponnappan*, 1 S. C. C. 90].

Land must be identified in deed.

There must be proper identification of the land in the deed so as to render its registration effective. Where a conveyance tendered for registration did not mention the real name of the land conveyed, and assigned boundaries which could not be identified, so that the conveyance was registered in the wrong book, it was thought to be doubtful that the deed could be regarded as registered. In such a case it would be void as against a subsequent deed duly registered [*Mel v. Fernando*, 4 N. L. R. 290 ; 1 Br. 243].

Deeds of gift.

A deed of gift not being a deed for valuable consideration, does not, by reason of prior registration, obtain priority over a deed previously executed [*Fernando v. Fonseka*, 1 C. L. R. 82] ; and so, a gift by prior registration does not prevail over a gift prior in date [*Hamidu v. Natchia*, 2 C. L. R. 32]. In the case of a sale of immovable property by a husband to his wife, it was held that inasmuch as all movable property to which a woman is entitled during her marriage is by

Sale by husband to wife.

Ordinance No. 15 of 1876 vested absolutely in her husband, the money mentioned in the deed as having been paid to the husband by his wife must be taken to be the husband's own money, and the transfer to the wife to be, therefore, without consideration gaining no priority by registration [*Ettana v. Allis*, 3 N. L. R. 330].

Competition between two mortgages.

In the case of *Arumogam v. Canapathipulle* [7 S. C. C. 120] the plaintiff held a mortgage [registered] of certain lands; the defendant held a mortgage of the same lands anterior in date but unregistered. The parties put their bonds in suit, obtained judgment, and severally purchased in execution the mortgaged lands. The defendant registered his Fiscal's conveyance, but the conveyance in the plaintiff's favour remained unregistered, and it was held that the registration of the defendant's conveyance rendered the plaintiff's conveyance void as against it.

Registration of letters of administration or probate.

The registration of letters of administration or of grant of probate does not avoid an unregistered mortgage or sale by the intestate; but if after taking out letters or probate, the administrator or executor sells or mortgages any property dealt with by the intestate, and gets the deed registered prior to that given by the intestate, the former deed would take priority over the latter [*Punchirala v. Appuhamy*, 7 N. L. R. 102].

Deed by administrator after registration of letters.

Registration ineffectual, unless parties claim adverse interests.

A prior unregistered deed is rendered void by the Ordinance only as against parties claiming an interest *adverse* thereto by virtue of a subsequent deed which has been duly registered. So, a secondary mortgage of land which, of course, is expressly subject to a primary mortgage of the same land gains no priority by prior registration [*Wijewardena v. Perera*, 4 S. C. C. 9.; *Oriental Bank Corporation v. Naganather*, 2 S. C. C. 146; *Brodie v. Anthony*, 9 S. C. C. 28]. In the case of *Sinnaiah Chetty v. Rupesinghe* [7 S. C. C 111] E executed a lease for a term of years in favour of the plaintiff. Three years later, E's interest in the land

Competition between lease and conveyance.

leased was purchased at a Fiscal's sale by the defendant, who had notice of the existence of the lease and who had the Fiscal's conveyance in his favour registered prior to the registration of the lease in the plaintiff's favour, and it was held that the lease was an interest in the land adverse to the defendant's conveyance, and the priority of registration of the conveyance rendered the lease void as against it.

Title of party claiming priority must be complete.

The title from one common source must be complete to render the provision as to priority by registration operative. In *Kadiravelupulle v. Pina* [9 S. C. C. 36] the plaintiff had a mortgage of a land from G. In execution of a money judgment against G, the land was sold to B, who in 1888 sold it to the defendant, who registered the conveyance in May, 1888. The plaintiff registered his mortgage in November, 1888. B, however, had not obtained a Fiscal's conveyance at the date of his sale to the defendant. The Fiscal's conveyance was obtained in 1889 and registered the same year. It was held that in the absence of a conveyance from B to the defendant after his title had been perfected by the Fiscal's transfer, the defendant had no interest in the land which could by registration obtain priority over the plaintiff's mortgage, but only a right to compel B to perfect his title thereto by a conveyance of the title acquired under the Fiscal's transfer, and the land was executable under the decree on the mortgage bond.

Purchaser from mortgagor not bound by mortgage decree, unless he is made party to mortgage action.

The purchaser from a mortgagor of land who registers the conveyance in his favour prior to an action on the mortgage bond will not be bound by the decree in such action, unless he was made a party thereto [*Abeyegoonewardene v. Andris*, 3 C. L. R. 71; *Ungo Appu v. Babuwe*, 3 C. L. R. 76].

In *Silva v. Silva* [1 N.L. R. 28] A mortgaged a parcel of land to B who put the bond in suit, and purchased the land at the sale in execution in 1890, but delayed

obtaining the Fiscal's conveyance until 1893 when he obtained it and registered it. Meanwhile A in 1892 sold the land to C who registered the conveyance the same year, and it was held [following *Silva v. Tissera*, 9 S. C. C. 92] that C's title was superior to that of B.

Land sold subject to mortgage.

Where a land is sold by the Fiscal in execution of a money decree subject to a subsisting mortgage in terms of an order of court passed under section 246 of the Civil Procedure Code, the purchaser who registers his conveyance gets no priority thereby over the rights of the mortgagee, although the mortgage bond is unregistered [*Bandiralle v. Saibo*, 2 N. L. R. 111].

Effect of non-registration of mortgage decree.

A question of some importance arose in the case of the *Government Agent v. Hendrick* [3 C. L. R. 86; 3 S. C. R. 120] as to the effect of non-registration of a mortgage decree [the mortgage bond itself being duly registered] in relation to a registered conveyance in favour of a purchaser at a Fiscal's sale under a money judgment obtained after the institution of the action on the mortgage bond. The court held that the mortgage was merged in the mortgage decree, and the fact of the registration of the mortgage bond was thereafter of no avail, and the non-registration of the decree gave priority to the registered conveyance in favour of the purchaser at the sale in execution on the money decree. This idea of merger was, however, repudiated in the case of *Madar Lebbe v. Nagamma* [6 N. L. R. 21; 2 Br. 322]; but at the same time it was there held that a mortgage decree was a decree which was capable of being registered under the Registration Ordinance, and ought to be registered, and if it was not registered any person claiming adversely to it under a subsequently registered instrument or decree was entitled to say that that unregistered decree was void as against him. In this case the land had not been sold under the mortgage decree: the plaintiff who was the holder of that decree merely

Merger of mortgage in decrec.

sought to execute it as against the defendant, the purchaser at the sale in execution of the money decree. In a later case [*Sami Appu v. Dissanaike*, 6 N. L. R. 263; 3 Br. 82], in which the land had been sold in execution of the mortgage decree, and purchased by the plaintiff, Wendt, J., was of opinion that the case had reached a later stage than the case of *Madar Lebbe v. Nagamma* [6 N. L. R. 21; 2 Br. 322], and applying the principle laid down in *Bellamy v. Sabine* [26 L. J. Ch. 707; 1 De G. and I. 578] that alienation *pendente lite* of the interest of one of the parties to an action should not be allowed to prejudice the rights of the other party, held that the registration of the conveyance in favour of the defendant was of no avail as against the conveyance in favour of the plaintiff.

The idea of merger given effect to in the case of *The Government Agent v. Hendrick* [3 C. L. R. 86; 3 S. C. R. 120] was repudiated in *Meera Saibo v. Ibrahim* [2 Br. 210] also; and the court there held that the purchaser under the money decree had a right to redeem the land from the mortgage by payment of the amount due on the bond.

No sale if there is mistake.

To revert to the subject of sales—There can be no sale where there has been a mistake as to the thing itself, as if I mistake one piece of land for another [Grot. 3. 14. 4].

Whether contract is sale or lease.

If a person promises to make a ring for another and to provide the material, since in that case sale and lease go together, such a contract is regulated according to the worthier of the two, and is regarded as a sale; but if a person gives property of his at a valuation to another to sell, it is not considered as a pure sale or mandate or lease, but as a special contract whereby the property is at the risk of the acceptor immediately after the agreement [Grot. 3. 19. 4].

What things may be sold.

The essence of the contract of sale is the existence of a certain thing to be sold. Where the thing about which

the agreement is to be made has never existed or exists no longer, there can be no sale. However, things *in futuro* may be sold, as this coming year's crop. We may even sell the hope or expectancy in such case. Thus, although there may be a total failure of the crop this year, yet the purchase money is nevertheless due. On the other hand, should the value of the crop exceed the purchase money six-fold, yet the purchaser is entitled to the whole [V. d. L 1. 15. 8].

Sale of goodwill and rights of seller.

The goodwill of a business may be sold, and it may here be mentioned that no person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business is, by reason only of such receipt, to be deemed a partner of or be subject to the liabilities of the person carrying on such business [Ord. No. 22 of 1866, sect. 6]. In the event, however, of the person carrying on such business becoming insolvent, or entering into an arrangement to pay his creditors less than twenty shillings in the pound or dying in insolvent circumstances, the vendor of the goodwill is not entitled to recover any profits as aforesaid until the claims of the other creditors for valuable consideration have been satisfied [sect. 7].

A person cannot purchase his own property.

No person can purchase that which already is his own, but he may purchase the property in a thing of which he has only the use, or which he enjoys in common with another, to wit, as joint tenant [V. d. L. 1. 15. 8].

Property must be of seller.

The property to be sold must be that of the seller or a third person [Grot. 3. 14. 9].

Knowingly purchasing property of third person.

One who has knowingly purchased the property of a third person, and has not taken care to secure himself as regards indemnification for eviction, cannot recover back even the price paid for it [V. d. K. 641].

Everything which may be an object of commerce is saleable.

What things may not be sold.

Things appropriated to the service of God, of the State, or of Towns may not be sold by private individuals. Such sale is null and void, although the purchaser has his recourse against the seller, if he himself was in ignorance. Poison may not be sold except for medicinal purposes. Property in litigation [*res litigiosæ*] may under the Roman-Dutch Law be sold [Grot. 3. 14. 10]; but the third party litigant may, if he succeeds, recover the property from the new possessor by execution without fresh proceedings [V. d. K. 630].

Personal claims may be sold.

Personal claims [*jura in personam*] may also be sold. Here, the seller must guarantee that the sale is a valid one, but not that the debtor is able to pay. One may even sell a doubtful right without any warranty, and this may be done, even after action is commenced, saving to the debtor his right of *naasting* in case of a personal claim [Grot. 3. 14. 12].

Certain things that may not be sold.

Stolen goods cannot be validly sold. For the maintenance, however, of an action for the value of stolen property against a purchaser who has already dispossessed himself of it, there must be *malâ fides* on his part [*George Wall & Co. v. Fernando*, Ram. 1872–1876, 301]. Nor could things of which the alienation was prohibited by the last will of the owner be validly sold, and it was unlawful to sell contraband of war to the enemy, and to sell machinery or tools appertaining to manufactories, if intended for exportation [V. d. L. 1. 15. 8], and houses for the purpose of being pulled down without the previous permission of the authorities [V. d. L. 1. 15. 8; Grot. 3. 14. 10]. It was also unlawful to sell small or pedlar's wares or merchandise for the purpose of huckstering. We could not also sell the property of another; and if the seller has thereby willingly or wittingly deceived an ignorant purchaser, he is liable in damages [V. d. L. 1. 15. 8].

When land is sold, the fruits or crops standing on the land are also considered as sold, and when a house is sold all that is attached to it by earth and nails. The sale of a park includes the wild animals, and of a pond the fish [Grot. 3. 14. 22]. Things appurtenant to the thing sold go with the latter.

Land is frequently sold *by the lump without measure.* Here even if some measure is mentioned, and the true measure is afterwards found to differ from the estimated measure by a *morgen* more or less, no account is taken thereof. If, however, the difference is greater, the sale nevertheless holds good, but in case of an over-measure the purchaser has the option whether he will keep the excess and pay for it in proportion to what is promised for the whole, or let it go to the seller. If there be under-measure, the seller has the option whether he will make good the deficiency, or return a proportionate part of the purchase price [Grot. 3. 14. 33]. Mistake as to extent of land sold.

If, however, a person in selling a piece of land mentions its measure and the number of *morgen*, but adds that he sells the land in the lump without measure, so that neither may make claim upon the other for under or over-measure, in such a case no compensation can be claimed however large the under- or over-measure may afterwards be found to be [Grot. Tr. Maas. 373, n.; Herb. 344, n.]. Sale of land in the lump.

The price can only consist of money, since the giving of anything else is not sale, but exchange or barter, which contract is not regulated according to the rules of purchase and sale [Grot. 3. 14. 24]. The price must be real and not imaginary or pretended; otherwise, the transaction is a donation. The price must further be defined, either directly or by reference to something else; as for instance, when I sell you my land for the same price per acre as Peter sold his. The price may be left to be determined by a third person, but not to one of the contracting parties [V. d. L. 1. 15. 8]. Price of property sold.

Price, at whose discretion.

The sale is void, if the price be left to the discretion of the seller or purchaser. Where the price is left to the valuation of a third party, and he will not give a valuation, the sale will be void for want of certainty of price [Grot. 3. 14. 23].

Time for payment of price.

Where no time is fixed for the payment of the price, the purchaser is liable forthwith to pay it [Grot. 3. 14. 24]. Payment may be stipulated not only in cash, but in instalments at certain periods [Grot. 3. 14. 25].

Mutual consent in contract of sale.

Land required for public purposes.

A principal and essential requisite in this contract is the mutual consent of the parties, no one being constrained to sell against his will except in cases wherein the State deems it necessary to purchase the property of any individual for the public use. In this case he is obliged to part with it on a reasonable compensation [V. d. L. 1. 15. 8]. This exception has already been noticed at length [pp. 219–237 *ante*]. This consent must be free and unrestrained, without the operation of fraud, error, or fear on either of the parties [V. d. L. 1. 15. 8].

When sale held as concluded.

Delivery of instrument of sale.

A sale is held as concluded as soon as the price has been reciprocally agreed upon [Grot. 3. 14. 27]. In Holland the sale of immovable property used to be effected by means of a "solemn cession" in the presence of the judge; and when the cession was made, it passed the *dominium* or property in the thing sold, though the instrument of cession was not delivered [V. d. K. 202]. Similary, the actual delivery of the deed of conveyance in Ceylon is perhaps not necessary to pass title to the property sold.

Withdrawing from bargain.

As long as the sale is in some way or other not completed, either party may withdraw therefrom without loss, excepting that the purchaser loses his earnest money, if any has been given. If the seller wishes to withdraw from the bargain, he must pay double the earnest money, if he has received any [Grot. 3. 14. 27].

In sales by public auction each bidder is bound by his bid, and yet acquires no right, if others bid higher [Grot. 3. 14. 30]. Sales by public auction.

It may here be mentioned that an auctioneer has a possession coupled with an interest in goods which he is employed to sell, and may maintain an action against the buyer for goods sold and delivered, although the sale was at the house of a third person, and the goods known to be his property [*Williams v. Millington*, 1 H. Bl. 81; 3 C. R. C. 583]. Auctioneer's right to sue for value of goods sold.

It is frequently stipulated that unless the purchase money is paid on the appointed day, the article shall be considered unsold. Here the sale takes effect at once, but, on default of payment, the seller has the option whether he will allow the sale to proceed or take back the article sold, retaining the earnest money and whatever has been paid on account of the sale [Grot. 3. 14. 32]. Stipulation as to default of payment of purchase money on the appointed day.

The purchaser, on the other hand, retains in such a case the fruits which have been gathered, which he would otherwise have to give over to the seller. This provision was introduced from the Roman law. It is not in use with us at the present day, and a seller may not with us in such case retain what has been paid on the sale [Grot. Tr. Maas. 372, n.].

The sale of a piece of land having been completed, it is at the profit and loss of the purchaser, although no delivery has taken place, and hence from that time all fruits and even alluvion to land go to the purchaser [Grot. 3. 14. 34], unless it is stipulated in the agreement of sale that the purchaser is not immediately to get possession of the property sold, but is to wait for it a certain time, in which case what is sold will only be at the profit or loss of the purchaser from such time, even though the delivery may have taken place before such time [Grot. Tr. Maas. p. 374, n.].

Loss consequent on destruction of property sold.

If the property sold be destroyed or damaged, the loss falls on the purchaser. The seller is bound for the custody of the property in the same manner as a *commodatarius*. He will be liable for compensation, unless the purchaser has made delay in receiving the property after the appointed time, or after reasonable time and notice. In that case the seller would not be liable except for fraud [Grot. 3. 14. 34].

Damage to property sold conditionally.

When property sold conditionally is damaged before the fulfilment of the condition, the damage falls upon the purchaser, unless that contingency has been otherwise provided for on the one side or the other [Grot. 3. 14. 35].

When contract of sale is complete.

The contract of sale is held as complete so soon as both parties are agreed as to the thing to be sold, the terms or conditions, the quantity, and the price. To the completion of the contract nothing further is necessary than mutual consent—neither the delivery of the goods, nor the payment of the purchase money, nor an instrument or bill of sale in writing, unless the latter was expressly agreed upon. A conditional sale is not perfect, until the condition takes place. In things sold by measure, weight, or number, the sale is not complete until the measuring, weighing, or counting has taken place [V. d. L. 1. 15. 8].

Conditional sale.

Things sold by weight, &c.

Right of property in thing sold before its delivery.

Before delivery, although the sale is complete by mutual consent, the right of property remains in the seller, and the buyer and seller have against each other only a personal action for the fulfilment of the contract. The first of these actions lies for the purchaser and his heirs against the seller and his heirs. The other, for the seller and his heirs against the purchaser and his heirs [V. d. L. 1. 15. 9].

The seller is bound to give the ownership to the purchaser, and, if he cannot, he should in addition to the purchase price make compensation to the purchaser to the extent of his interest in the matter. This

is called warranty, and the person who is liable to it warrantor [Grot. 3. 14. 6]. Warranty.

In some parts of Holland it was the custom that the seller of immovable property must always give security even without any stipulation. The seller, however, is not bound to give security, unless such is stipulated in the agreement, or unless some third party, before the price has been fully paid, advances some right or claim to the thing sold [Grot. 3. 14. 7, 8]. Security by seller.

The seller is bound, if he is the owner of the property sold, to transfer the ownership to the purchaser. This is done by delivering and putting in possession, that is, if the purchaser has previously paid the purchase price, or has given security, or received credit for the same. If the seller is not the owner, he is still bound to give the purchaser free possession, so that the purchaser may acquire the ownership by prescription if not judicially sued. He is also bound to point out the boundaries of the land to the purchaser, and to deliver all proofs of title which are in his possession [Grot. 3. 15. 4]. The purchaser, when he has used such proofs, is bound to return the same to the seller [Grot. Tr. Maas. 377, n.]. If the purchaser be molested, the seller is bound to warrant. The purchaser consequently, whenever his title to the property sold is judicially interfered with, either wholly or in part, is bound to give timely notice thereof to the seller, who will then be bound to take over the case for him; otherwise, the purchaser will lose his recourse against the seller, unless the property beyond all doubt belonged to another. But the seller is not liable, if the purchaser loses the property through his own fault or by the act of the Sovereign. If the property has been judicially taken from him, the purchaser has the option of demanding back the value of the property such as it was at the date of the sale or of all the interest he had in not losing the property [Grot. 3. 15. 4].

Seller bound to transfer ownership

and deliver all proofs of title.

Notice to warrant and defend.

Where seller stipulates he is not liable for eviction.

If the seller has stipulated that he is not liable for the eviction of the purchaser from the thing sold, and the purchaser is afterwards evicted, the seller is not liable for the damage suffered by the purchaser in consequence of the eviction, but must return the purchaser the price [Grot. Tr. Maas. 377, n.].

Vendor bound to warrant title in the absence of express covenant.

A vendor is bound to warrant his title, although he has given no express covenant for that purpose [1 Lor. 120].

Crown not bound to warrant and defend.

The Crown is not bound to warrant and defend its title to property sold [Ram. 1877, 317].

No warranty by Fiscal.

No warranty of title passes at a Fiscal's sale. A purchaser merely buys the debtor's interest, good, bad, or indifferent [*Abdul v. Pattu Muttu*, 2 S. C. C. 158. See also *Wickremeratne v. Gunesekere*. 1 S. C. C. 80].

Delivery of thing sold.

The seller must deliver the property sold to the purchaser, or, otherwise he is bound to make compensation to the extent of the purchaser's interest therein, the sale itself remaining valid. The purchaser in this case also is bound as above to give the seller notice whenever he is sued [Grot. 3. 15. 5].

Purchaser may recover cost of improvements.

A purchaser on eviction can recover from the seller not only the purchase money, but the cost of improvements, if any, made by him since the purchase [Ram. 1860–1862, 96].

To entitle purchaser to proceed against vendor he must suffer eviction after vendor has been called upon to warrant and defend.

Not sufficient merely to summon vendor as a witness.

As observed elsewhere, there is, under the Roman-Dutch law, implied in every contract of sale a warranty by the vendor that the purchaser shall have the absolute and dominant enjoyment of the goods. Before, however, the purchaser can recover damages for breach of such warranty or claim back the price, he must suffer eviction by the judgment of a competent court. Such judgment is not binding on the vendor, unless he has been called upon to warrant and defend the purchaser's title [*Abdul v. Caderaveloe*, 2 C. L. R. 165]. Merely summoning the vendor as a witness is not such a notice to warrant and defend as would entitle the purchaser

upon eviction to sue for damages on the footing of a breach of warranty [*Adonis v. Akolis*, 8 S.C.C. 197].

When vendor may be sued without notice to warrant and defend.

A vendor may be sued for breach of warranty, although he has had no notice of the proceedings that terminated in the eviction of the purchaser, if it can be proved that the vendor had no shadow of a title to the property sold [*Fernando v. Jayawardene*, 2 N. L. R. 309. See Vand. D. C. 241, and *Weerasinghe v. Abeysinghe*, 1 C. L. R. 29].

Fruits and profits.

The fruits and profits of the property sold accruing after sale must also be delivered to the purchaser, if he has paid the purchase price but not otherwise. Animals must be delivered in the same condition as they were at the date of the sale. If delivery is delayed by the seller, the purchaser has the option of either claiming the delivery together with all profits and compensation for loss, or merely compensation to the extent of his interest in the delivery. The seller is bound to make compensation for whatever damage the purchaser has suffered by the fraud or delay of the seller [Grot. 3. 15. 6].

Where delivery is delayed by seller.

How seller may be compelled to deliver.

The seller may be compelled to make delivery by *gyzeling* or civil imprisonment. He cannot escape it by offering in place of it to pay the damage caused by the non-delivery [Grot. Tr. Maas. p. 378, n.].

Defect in thing sold.

If the article sold has some defect of which the purchaser did not know at the time of sale, and the defect is such that the sale by reason of it would probably not have gone through, the purchaser may return the article and recover his money. If the sale, notwithstanding it, would probably have proceeded, the purchaser may demand restitution of the excess of the purchase price over the price he would otherwise have given for the article. Should it appear that the seller knew of the defect at the time of the sale, he will be liable for all damage which the purchaser may suffer thereby. The same is the case if the article sold was let by the seller

previously to the sale, and the purchaser had no notice thereof, and consequently is deprived of the use of the article for some time [Grot. 3. 15. 7 ; V. d. K. 642].

Puffing.

If the thing has no defect, but the seller at the time of the contract says something beyond the truth or makes any misrepresentation in order to praise up the article, the purchaser may claim restitution of the excess of price given by him in consequence thereof [Grot. 3. 15. 8].

The seller and purchaser are liable to each other for whatever good faith, according to reason and equity, demands, as also for all express stipulations, even though these are alien to the nature of the transaction. Doubtful stipulations are interpreted rather against the seller than the purchaser [Grot. 3. 15. 9].

Appurtenances of thing sold go with it.

With the goods the seller must give up all that appertains thereto ; for example, with a house all its fixtures. In case the goods sold have any substantial defect, or are burthened with any secret incumbrance, he is bound to reduce the price accordingly, or even to cancel the sale, if he has purposely misled the buyer [V. d. L. 1. 15. 9].

Where land is sold, buildings thereon pass to the buyer unless they are specially excluded [Vand. C. R. 256].

Liabilities of purchaser.

The purchaser is bound to pay the seller the purchase price ; to re-imburse the seller for all necessary expenses incurred by him subsequently to the sale in connection with the thing sold ; and if after delivery of the thing sold, or, otherwise, he has made default in receiving the property, to pay the seller interest at the rate of the 16th penning on the purchase price. He may also be compelled to receive the property bought, and, in case of refusal, is liable for any damage which the seller may suffer thereby [Grot. 3. 15. 1].

Sale at too low a price.

If the seller, through the false representations of the purchaser, has sold the property at too low a price, the

purchaser is bound to make good the deficiency [Grot. 3. 15. 2].

Purchaser bound to precede in payment.

If the seller is ready to make delivery on payment of the purchase price, the purchaser is bound to precede in the payment [Grot. 3. 15. 3]. But if they do not trust each other, it will be sufficient for them to deposit the price in court or in the hands of a third party mutually chosen by them [Grot. Tr. Maas. 376, n.].

Sale of inheritance.

In the purchase and sale of an inheritance it is not so much the particular and special parts of it as the entire right of the seller to the whole in general as it existed at the time of the sale that is transferred to the purchaser, while the purchaser, besides the payment of the purchase money, is bound to save the seller harmless from all claims and demands of the creditors of the estate who notwithstanding the sale have still their right of action against the seller [V. d. L. 1. 15. 9]. This is to be understood of the case in which the heir having entered on the inheritance whereby, under the Dutch law, he becomes liable for all the debts of the ancestor, afterwards sells it to a third person with all its incumbrances [V. d. L. Tr. Hen. 232, n.].

Sale of debt or right of action. Cession of action.

When we sell a debt or right of action against a third person, we are bound to give the purchaser an assignment or "cession of action and procuration in *rem suam*," or an irrevocable power of attorney to sue in our name for his own benefit [V. d. L. 1. 15. 9].

The Lex Anastasiana.

Ordinarily, the assignee of a debt can recover the whole amount of the debt from the debtor regardless of the amount he paid for it to the assignor. Under the *Lex Anastasiana* he could recover only to the extent of what he himself had paid [Voet 18. 4. 18]. The question whether this law prevailed in Ceylon was considered in two cases [D. C., Galle, 32,460, Gren. 1874, 32; and C. R., Kalutara, 37,772, Ram. 1877, 152], and the Supreme Court thought that the *Lex* nowadays applied to what were called "litigious claims," and further that

the right of a debtor to compound for the actual sum paid by the party who had purchased the claim was excluded where the sale was made after a previous offer to the debtor at the same price or where the sale was by public auction. The Anastasian Law or any rule analogous to it cannot be applied to cases free from any taint of unfairness, consistently with the ordinary principles which regulate the administration of justice, and ought, if contended to be so applicable in any system of jurisprudence, to be clearly shown to be so by the person thus contending [*Macrae v. Goodman*, Moore P. C. R, Vol. 5, 315].

The *Lex Anastasiana* was a law of the later Roman Empire laying down that no one who purchased a claim should be allowed to exact more from the debtor than the price he, the purchaser, had paid for the debt. The rule was insisted on, although the vendor declared that the price did not represent the actual value, the claim having been partly transferred as a gift. The principle of this law was followed in Holland where, when a debt had been transferred to a third party. the debtor had a *naasting* or *jus retractus*, that is to say, the debtor could take over and thereby cancel the debt at the same price as the creditor had paid for it [Groen. *de Leg. Abr. ad. Cod.* 4. 35. 23]. Although there is something to be said for this rule as preventing speculation in debts, it has been decided in a case in Cape Colony [*Seaville v. Colley*, 9 S. C. 39] that it is not the law of South Africa. Sir Henry de Villiers based his decision in the case on the fact that the rule, which he considered an unnecessary restriction on freedom of contract, had never been recognised by any court in South Africa, and was opposed to the custom of men of business [Mor. Eng. and R.-D. Law, 85].

Equities extended to assignee.

In the case of an assignment or sale of a debt or right of action the equities as between the grantor and grantee extend to the assignee or purchaser. So, failure

of consideration on a bond is a good defence in the mouth of the obligor even as against an assignee thereof for value [Vand. D. C. 74. See also *Artukami v. Selenchi*, 8 S. C. C. 45; *Narayani v. Kanapathy*, 6 S. C. C. 68]; and payment by the debtor, unless he has had due notice of the assignment, to the original creditor discharges the debtor.

Assignee may sue in his own name.

In the case of a bond assigned by the creditor with power to the assignee to sue in the name of the assignor, such power is to be deemed to be given only *pro abundanti cautela*. The assignee may sue in his own name [*Per* Withers, J., in *Ramen Chetty v. Ferdinands*, 2 C. L. R. 194].

"The sale or transfer to another of a debt or right of action," says Cayley, C.J., in *Katheramer v. Kathirgeser* [3 S. C. R. 56], "is in itself a cession of action, although no power of attorney to sue has been given [Sande, *de actionem cessione*, Ch. 1, sect. 3; Ch. 2, sects. 2, 17; Ch. 8, sects. 4, 7, 8]. And although by the technical rules of the more ancient Roman law it was necessary that the assignee should be constituted the procurator or attorney of the assignor *suam rem*, that is to say, should have a power of attorney to sue in the name of the assignor for his [the assignee's] own benefit; and though, under the same ancient system, it was necessary that the attorney should sue in the name of the vendor or assignor, though for his own interest, just as the rule of the English common law is to the present day, yet in the later Roman law a more equitable principle was adopted, and in equity a *utilis* or like action in the name of the vendor himself was allowed. This privilege was subsequently extended to other assignees besides purchasers. Therefore, no power of attorney from the vendor is necessary to enable the purchaser or assignee of a debt to sue the debtor. If he has not received one, he may sue in his own name. If he has received one, he has his choice

either to sue under it in his vendor's name, though for his own interest, or to sue in his own name. The authorities for these positions will be found in the Code 4. 39. 7, 8 ; Sande de Act. Cess. Ch. 8 *passim*, but particularly sections 2, 8, 18, 19, 20 ; 3 Burge 547 ; and Voet 18. 4. 17. The law most directly to the point will be found most clearly laid down in Sande's treatise, and in this respect the law of Holland followed the equitable rule of the later Roman law ; and our usage has always been the same in Ceylon."

Right to demand money is not movable property.

A claim or right to demand money is not movable property under sections 2 and 3 of Ordinance No. 8 of 1871. It is a chose in action within the meaning of section 7, and an assignment thereof need not be registered under the Ordinance [*Dawson v. Van Geyzel*, 3 C. L. R. 35]. Nor does a mere chose in action come under the term "movables" used in the definition of "goods" in section 4 of the "Sale of Goods Ordinance, 1896" [*Cross v. De Soysa*, 7 N. L. R. 32].

Recission of sale. Mutual release.

Recission of sale takes place—

(1) When the contracting parties release each other by mutual consent, though if delivery had actually been made of the thing sold, it would then be a new contract of sale [Grot. 3. 17. 3 ; V. d. L. 1. 15. 10].

Destruction of thing sold.

(2) If the property sold is destroyed before the completion of the sale [Grot. 3. 17. 3].

Fraud of seller.

(3) If the sale was wholly brought about by the fraud of the seller, and would otherwise not have been entered into. Here, the sale would be annulled upon the application of the purchaser. If there has been fraud on both sides, for instance, if two persons have contracted with respect to property which they knew to have been stolen, the sale, as being contrary to law, will be null and void *ab initio* [Grot. 3. 17. 3].

Defect in thing sold.

(4) If the purchaser through the fraud of the seller has without notice ignorantly bought something labouring under some defect. Here too the sale may

be annulled on the application of the purchaser, if he would otherwise not have concluded the sale ; and even if this were not the case, if the defect interferes with the use of the article, and the purchaser makes his application within a year [Grot. 3. 17. 4].

Enormis læsio.

(5) If the seller or purchaser has been prejudiced in the price to the extent of more than half the real value, even though no fraud has been perpetrated on either side. The party so prejudiced may give the other the option of either cancelling the sale or of increasing or reducing the price in accordance with the real value. This mode of restitution applies to almost all contracts [Grot. 3. 17. 1–5].

What vendor must prove.

In order to succeed in an action for recission of sale brought by the seller on the ground of *enormis læsio*, the plaintiff must prove that the property was at the date of the sale worth double the price the defendant paid for it [*Gooneratne v. Philip*, 5 N. L. R. 268]. The annulling of the contract on this head is not permitted, when the other party is prepared to increase or reduce the price of the thing to its true value [V. d. L. 1. 15. 10].

As observed already, the value of the subject-matter of the contract is to be taken at the time the contract was entered into. Thus, for instance, *læsio enormis* would not apply to shares in mining companies which have exhibited a sudden drop after the purchase. The aggrieved party's remedy is not confined to cancellation of the contract : he may recognise the contract, and sue for damages. In other words, the contract is, in the language of the English law, voidable not void. "In its application of the doctrine of *læsio enormis* to contracts generally, Dutch law has gone beyond Roman law, which, according to the generally received opinion, merely recognised cancellation of sale by the seller on the ground of the price being less than half the value. This extension of the doctrine is quite clear from Grot. 3. 52. 2 ; V. L. 4. 20. 5. The tendency in South Africa

is to restrict the operation of recission on the ground of *læsio enormis*, and in Cape Colony it has been abolished. Even in early times *læsio enormis* did not apply to a sale made by order of a court, or when directions had been given to an heir by a testator to sell property at a certain price. *Læsio enormis*, further, was not regarded in the case of an *emptio spei*, such as the sale of the crop which a field would produce in the following year, for the chance purchased was regarded as having no definite or ascertainable value at the time of the sale" [Mor. Eng. and R.-D. Law 82].

Sale for ready money.

(6) When anything is sold for ready money and payment does not follow. Here, the seller is at liberty to redeem the goods, and to annul the contract [V. d. L. 1. 15. 10].

Condition as to higher offer.

(7) When the goods are sold on this footing, that the sale shall be considered as void, if within a certain limited time a higher offer is obtained, or if within a fixed time the purchase money is not paid [V. d. L. 1. 15. 10].

Where thing sold is claimed by third party.

(8) When afterwards any one comes forward and shows a right of property or other real right in the thing sold. In this case the seller must guarantee the thing sold, and so take up the cause for the buyer; and if the thing is adjudged to the claimant, the seller must refund to the buyer the purchase money with interest and indemnify him for all costs and damages [V. d. L. 1. 15. 10].

Purchase of stolen property.

In Holland a *bonâ fide* purchaser of goods in the public market place on a regular market day was not compellable to restore them to the true owner, if they turned out to have been stolen, without receiving compensation for what he had paid for them [Voet 6. 1. 7, 8]. There are no market places and stated market days in Ceylon, like those in European countries, and consequently the exceptional privilege given to a purchase in market overt, as it is commonly called, does

not exist here, and the owner of stolen property has a right to recover it absolutely from even an innocent purchaser [*Northmore v. Meyapulle*, Ram. 1863–1868, 95].

Alienation of property by insolvents.

Alienation of their property by insolvents or bankrupts, that is, persons who have absconded without paying their debts, whereby their creditors are prejudiced is null and void [Grot. 2. 5. 3]. But all alienations previously made by an insolvent become valid, unless annulled by the creditors within a year after their receiving notice thereof. This may be done, whenever the party by whom the property has been acquired got it gratuitously or at a nominal value, or knew that the alienation was made with the object of defrauding creditors. In this case the property must be returned together with its fruits, provided that on the other hand restitution be made of whatever has been paid for the same [Grot. 2. 5. 4].

Alienations in fraud of creditors.

The *actio Pauliana*.

Alienations in fraud of creditors made at any time by one who is insolvent, but has not yet ceded to the court, are not *ipso jure* void, but may be rescinded within one year by means of the *actio Pauliana* (which had in this respect been adopted in Holland) without the necessity of *restitutio in integrum*; and a purchaser who has been privy to the fraud is not entitled to restitution of the price paid by him, if not found in the debtor's estate. But a payment to one of the creditors not made for the purpose of procuring any benefit for the debtor is valid [V. d. K. 200].

It may here be observed that an insolvent may before his insolvency make valid payments to such creditors as press him for payment [Grot. 2. 5. 4].

The *actio Pauliana* is an action *in factum*, and lies for revocation of whatever has been alienated in *fraudem creditorum* either before or after the immission of the creditors in the estate of the bankrupt debtor. In this action attention should chiefly be paid to the question whether any one has intended to enrich himself in

prejudice of the creditors or not. The acquisition of property *oneroso titulo* removes every presumption of fraud [V. L. Kot. Tr. Vol. I., p. 197, n.].

Property purchased by person in insolvent circumstances.

A person who, knowing himself to be insolvent, has fraudulently purchased anything from another, and has shortly after made cession to the court, though credit may have been given him for the price, is bound to restore the thing to the seller on his claiming it [V. d. K. 204].

Summary of judgments.

The following are decisions of importance under this head—

Conveyances by persons in pecuniary difficulties.

Conveyances of property by persons in pecuniary difficulties will not be supported as against creditors, unless they are free from suspicion of fraud. Transactions of the kind, more especially when the parties are husband and wife, will be jealously watched, and unless it is clear that the sale was *bonâ fide* and for full value, it will not be upheld. [See *Komali v. Rodrigo*, 7 S. C. C. 73 and the cases cited there.]

Gift by person in insolvent circumstances.

Under the Roman-Dutch Law acts of munificence are valid, though prompted by an *inhonesta affectio;* but the Civil Law, in order to protect creditors, has in effect provided that alienation by gift may be set aside, when a man gives away the whole or a considerable part of his estate knowing that he is insolvent, and that he is diminishing the substance out of which his debts might be paid. He who acts thus will be considered to have intended the natural result of his acts, which is the defrauding of his creditors; and in such a case fraud on the part of the donor is sufficient to invalidate the donation, though the donee had no knowledge of the fraud or of the circumstances from which it is inferred. But neither a donation nor a sale would be considered fraudulent, if the donor or vendor were solvent at the time he made it, and if the disposition had not caused him to cease to be so. It is only when the property retained by the donor proves insufficient to meet the

claims of creditors that they can follow the property which has been injuriously gifted away by him [*Kannappen v. Mylipody*, 3 N. L. R. 274. See also *Supermanian v. Gonewardene*, 3 N. L. R. 278].

Fraudulent deed not void against those not parties to action.

A deed which, in an action, is declared fraudulent does not, however, *ipso facto* become void as against those who were no parties to the action [*Francina v. Nicholas*, 2 S. C. R. 85].

When cause of action to set aside deed arises—Prescription.

The cause of action to set aside a deed as fraudulent arises when it becomes clear that the effect of the deed will be to defraud creditors. It does not necessarily arise at the time of the execution of the deed. It arises after all the rest of the property of the debtor not included in the impeached deed has been exhausted by creditors, and when it becomes quite certain that unless the deed is set aside there will not be the means of satisfying the debts. The action to set aside the deed must be brought within three years of the accrual of the cause of action [*Appuhamy v. Lokusingho*, 4 N. L. R. 81; 1 Br. 179].

Fraudulent preference.

Who can sue to have a transaction declared fraudulent.

Fraudulent preference is the preference by an insolvent debtor of a creditor in fraud of his other creditors, and it is only a trustee who represents all the creditors who can ask a court to declare a transaction to be a fraudulent preference in order that the preferred creditor may be compelled to restore what he has unfairly acquired to the estate for equal distribution among all the creditors. So, where a creditor sues his debtor and his vendee to have the conveyance cancelled on the ground of fraud before seizing the land conveyed in execution of his judgment on his money claim, it is a question whether the action is not premature and whether the plaintiff could succeed in having the conveyance cancelled. What he should ask is that the conveyance be declared void, and the land declared executable for satisfaction of the judgment in his favour [*Meerasaibo v. Philippal*, 2 N. L. R. 124].

Creditors who may sue to set aside deed as fraudulent.

A bond given without consideration by a person in a state of insolvency is void as a fraud upon all persons who were creditors at its date and prejudiced by it. A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved to have been made with an intention to defeat future creditors [*Silva v. Mack*, 1 N. L. R. 131].

Alienation by judgment-debtor.

Alienation by a judgment-debtor of immovable property for valuable consideration before seizure with the intention of preventing its seizure would not necessarily be fraudulent, unless the act made him insolvent, or he was insolvent at its date [*Natchia v. Assen*, 2 Br. 205].

Facts to be proved to set aside a deed for fraud.

When a transaction between two parties is sought to be set aside as having been entered into in fraud of creditors, it is not sufficient to show eliments of suspicion ; but a fraudulent intent on the part of the debtor to defraud his creditors, and the fact of any creditor having been thereby prevented from recovering his debt must be actually proved [*Baba Ettena v. Terunnanse*, 2 Br. 355].

Transactions by bankrupt in respect of property acquired after bankruptcy.

When a bankrupt enters into transactions in respect of property acquired after the bankruptcy, then, until the assignee intervenes, the transactions are valid as against him, provided they were for value, and the persons dealing with the bankrupt acts *bonâ fide* though, it may be, with the knowledge of the bankruptcy [*Aliph v. Walles*, 3 S. C. R. 143].

Jus retractus.

Naasting (*jus retractus*) is the right of a person over immovable property as also against the purchaser and seller thereof to step into the place of the purchaser, whenever the property is sold. [See Grot. 3. 16 as to this right].

Barter and Exchange.

Giving in return for giving, when it consists of single things, is called Barter. When money is given for money, the transaction is called Exchange. The peculiarities of purchase and sale which include the

right of *naasting*, do not apply to Barter, but if what is given turns out to be defective, restitution or compensation takes place in the same way as in the case of purchase and sale [Grot. 3. 30. 6].

Eviction in case of Barter.

If in the case of Barter eviction takes place in respect of the thing given in exchange for that first given, the contract is to be considered as unfulfilled on the side from which the thing given in exchange came; but if that which was first given was not the property of the giver, the contract will be considered as null and void, and the property given in exchange may be reclaimed as having been given without lawful cause [Grot. 3. 30. 9].

SUB-SECTION VII.

LETTING AND HIRING.

Definition.

LETTING and Hiring is an agreement whereby one party binds himself to suffer another to have the use of a certain thing during a fixed and limited time in consideration of a certain sum of money as hire or rent which the other binds himself to pay [V. d. L. 1. 15. 11].

Has lessee ownership in thing leased?

A lessee of land or a house is not acccording to the Roman Law considered as having any ownership in or real right to the property leased, but has only a personal claim against the lessor. Under the Dutch Law lease as being a use for a short time does give a right of ownership (that is, as regards such use). If the leased land or house is sold, the lessee nevertheless retains his lease. A lessee of land, however, has not this right, unless he has a written lease. A lessee also may transfer his right to another, except where local customs prohibit it or limit the right [Grot. 2. 44. 9].

Where premises are sold by Fiscal.

Where the premises are sold by the fiscal on a writ of execution against the landlord, and notice is given to the tenant of such sale, he is bound to pay to the vendee the rent thereafter accruing due [*Morris v. Mortimer*, 2 S. C. C. 96].

Lessee can maintain action in ejectment and possessory suit.

It was held in the case of *Pinhami v. Puran Appu* [1 S. C. R. 144] that a lessee can maintain an action to eject from the land leased a party claiming adversely to his lessor, even though he himself never had any possession under his lease, and also for damages by reason of his having been kept out of possession; and in the case of *Goonewardene v. Rajapakse* [1 N. L. R. 217] it was held that a notarial lease was a *pro tanot* alienation, and gave the lessee during his term the

legal remedies of an owner and possessor; and in *Perera v. Sobana* [6 S. C. C. 61], that a lessee could maintain a possessory action against his lessor. These decisions have been commented on in this work already [see p. 456, *ante*].

When the lessee at the expiration of the lease continues in the occupation of the house, the lease under the Roman-Dutch Law was considered as renewed for the same length of time as had been previously agreed upon [Grot. 3. 19. 2. See also Groen. de. Leg. 4. 65-16]. Lessee continuing in possession after expiration of lease.

In *Maduanwala v. Ekneligoda* [3 N. L. R. 213] it was held that a person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation.

A lease cannot be contracted except for a time; otherwise, it would be usufruct or something else. If no time is mentioned, a year would be understood in the case of land; in the case of a house, until one or the other terminates the lease, which must be done at a convenient time, so that the lessor may have an opportunity of letting his house and the lessee of providing himself with another house [Grot. 3. 19. 8]. Lease must be for fixed time.

A person may let a thing to another for as long as he pleases, which lease is understood to terminate on death, although other leases of which the term is fixed continue after the death of the lessee and go over to his heirs [Grot. 3. 19. 9]. Letting for as long as lessor pleases.

A lessee may sublet to another the property leased to him, unless the contrary has been agreed upon. This does not hold with respect to the letting of labour. As regards houses it is forbidden by the charters of almost all towns, except with the consent of the owners [Grot. 3. 19. 10]. Subletting.

Assignment of interest by lessor and lessee.

In Dutch Law the lessor can in all cases assign his interest. This most usually takes place by the sale of the property. As regards assignments and sub-leases by the lessee, the consent of the lessor is not required in the case of urban tenements or house property [*prædia urbana*]. In regard to rural tenements or lands [*prædia rustica*] the Supreme Court of Cape Colony has held that such an assignment requires the written consent of the lessor. The High Court of the Transvaal has held, on the other hand, that such consent is not necessary. The same rule is applicable to sub-leases [Mor. Eng. and R.-D. Law, 155].

With regard to an assignment of the reversion, *i.e.*, of the lessor's interest, one may naturally assume that under Dutch Law, as lease is preferent to sale, and as the assignability of actions is recognised, the assignee of the reversion will obtain all the benefits of the stipulations of the lease, and will be subject to all the equities, at least so far as such rights or equities affect the premises leased. This seems to be the view that Sir Henry de Villiers takes, and which he regards as consistent with the maxim, lease goes before sale [*Executors of Paterson v. Webster*, 1 S. C. 350. See Mor. Eng. and R.-D. Law, 158].

In the case of an assignment by the lessee, it has been decided in the Transvaal that where a lessee cedes his lease to a third person, who thereafter pays the rent to the lessor, a *vinculum juris* is created between the lessor and such third person. In the case of *Green v. Griffiths* [4 S. C. 347] Sir Henry de Villiers makes the following remarks—" In regard to assignees, however, by our law, agreeing in this respect with that of Scotland, but not with that of England, an assignment is not complete, unless it has the effect of substituting the assignee as tenant in lieu of the original lessee. The obvious difficulty in the way of such a transfer is the want of privity of contract between the lessor and the

assignee. In England, the difficulty has been met by saying that there is *a privity of estate* between them. Now, to the extent to which a lessee acquires a real right in the land, it is not repugnant to any principle of our law to hold that the transfer of the right involves the transfer of the obligations attaching to that right." It would thus appear that the tendency of the South African Court is to hold that, when an assignment by the lessee has taken place, and when either the lessor has recognised the assignee, or the lessor's assent to the assignment was not necessary, the lessor and the assignee stand to each other as did the lessor and the original lessee so far as regards rights and obligations affecting the premises leased. Naturally, however, the original lessee would remain liable [Mor. Eng. and R.-D. Law, 159.]

What the thing let may be.

The thing let may be the labour of the person letting or of some other person or of an animal or the use of some thing [Grot. 3. 19. 1]. Whoever without lawful excuse dismisses a servant within the time stipulated for his service must allow him full wages [Grot. 3. 19. 3].

The rights under contracts of letting and hiring pass to and against the heirs of the lessee and lessor [Grot. 3. 19. 16].

Essentials of contract.

The requisites essential to this contract are—

Thing to be let.

(1) A thing capable of being let on hire, whether movable or immovable, corporeal or incorporeal, as the farming of tolls and duties. The hirer or lessee must be assured of a certain use or enjoyment which is usually limited by a clause in the lease; for instance, land which is let for pasture may not be ploughed or sowed. The use of the thing is not unlimited, but only for a certain time. When this time exceeded twenty-five years, the indenture of lease was, under the Roman-Dutch Law, to be a judicial act, and the government duty of two and a half per cent. had to be paid [V. d. L. 1. 15. 11].

Rent.

(2) A definite rent or hire payable generally in money, although sometimes part of the rent is paid in produce [V. d. L. 1. 15. 11]. The rent may be in articles capable of being measured, counted, or weighed; but use in return for use constitutes a contract by itself which has no special name [Grot. 3. 19. 6]. A tenant may justify non-payment of rent by proof that the landlord has committed a breach of the lease [Gren. 1873, Part II., p. 49].

May be in articles capable of being measured, &c.

Where landlord commits breach of lease, tenant excused from payment of rents.

Misdescription of land leased.

In the absence of fraud on the part of the lessor, when lands are leased, and there is no dispute as to the lessee having received the whole estate which he meant to take on lease, he is not entitled to abate the rent on account of a mere error in setting forth the property by way of description as consisting of so many acres, or yielding such an amount of rental [*Stork v. Orchard*, 1 S. C. R. 1]; but Withers, J., thought that where the lessor had made out the property to be much larger than it was actually found to be, that is, where the misdescription in regard to the quantity was a notable one, the lessee was entitled to have the rent reduced in proportion to the small extent of ground.

Lessee may prove that lessor's title has expired.

A lessee cannot refuse to pay rent on the ground that the lessor had no title to the premises leased at the date of the lease. He may, however, prove that since the tenancy commenced the title of the lessor has expired. He may also rely on facts which amount to eviction by paramount title [*Doe v. Barton*, 11 A. & E. 312, per Ld. Denman; *Gouldsworth v. Knight*, 11 M. & W. 344; Tay. on Ev. 125].

Mutual consent.

(3) The mutual consent of the hirer and letter or lessor and lessee. In the letting of houses and lands it was necessary under the Roman-Dutch Law that the consent should appear in writing, and therefore a lease on a proper stamp was necessary [V. d. L. 1. 15. 11]. The letting and hiring of property in town might, under the Roman-Dutch Law, be effected even without

Writing when necessary.

a writing [V. d. K. 670]; and the common opinion of the interpreters of Dutch Law, says Van der Keessel, namely, that a lease of country property is not valid without a written instrument, cannot be supported either by the Placaat of the 22nd January, 1515, or by Article 31 of the Political Ordonnance, declared by the Laws of the 26th September, 1658, and the 24th February, 1696 [V. d. K. 672].

Leases of lands to be in writing in Ceylon.

In Ceylon no promise, bargain, contract, or agreement for establishing any security, interest, or incumbrance affecting land or other immovable property, other than a lease at will or for any period not exceeding one month, is of force or avail in law, unless the same is in writing, and signed by the party making the same or by some person lawfully authorised by him, in the presence of a licensed notary public and two or more witnesses, present at the same time, and unless the execution of such writing is duly attested by such notary and witnesses [Ord. No. 7 of 1840, sect. 2. See further p. 555 *ante*].

Need a lease at will or for not more than a month be in writing?

This provision, of course, implies that a lease at will or for a period not exceeding one month need not be in writing, and signed in the presence of, and attested by, a notary and two witnesses. The Ordinance does not say how such a lease is to be executed; and the law in force prior to the passing thereof would therefore seem to apply to it. As to that law, Voet [14. 2. 2], Van der Linden [1. 15. 11], and Van Leeuwen [4.21.2, 3] lay down that leases of houses and lands must be in writing; but Van der Keessel, as observed already, is of the contrary opinion; and the Court of Cape Colony was of opinion that the laws or placaats to which Dutch writers refer were Fiscal ordinances of Holland not applicable to South Africa [*Herbert v. Anderson*, 2 Menzies, 173; *Victor v. Courlois*, 2 Menzies, 173; *Kruger v. Maree*, C. L. J. 1890, p. 51]. It cannot, however, be said that the law on the subject is very

well settled [Mor. Eng. and R.-D. Law, 144]. In Ceylon, the validity of leases at will or for a period not exceeding one month, entered into verbally, has not been questioned in any case.

Verbal contract of lease for more than a month.

In the case of a verbal contract of lease for more than a month, reasonable rent for use and occupation may be recovered [*Dissanaike v. Francisku*, 1 Tamb. 23; Gren. Part III., p. 1].

Action for use and occupation.

The action for use and occupation, it may here be mentioned, is an action *ex contractu*, and does not lie where the defendant has never admitted title in the plaintiff, but has occupied under a claim of title hostile to the plaintiff. To support this action it is necessary to show that the defendant's occupation was an occupation by the permission of the plaintiff under some contract with the plaintiff which may be presumed from the fact of the plaintiff's title and the defendant's occupation [*Perera v. Peries*, 5 S. C. C. 133].

Tenant under informal agreement.

A tenant in possession under an agreement invalid under the section of the Ordinance cited above is merely a tenant at will, and not a monthly tenant [*Secretary of State for War v. Ward*, 2 Br. 256]; but it was held in *Wambeck v. Le Mesurier* [3 N. L. R. 105] that a tenant entering into possession of land, under a written lease void in law, thereupon becomes tenant from month to month upon the terms of the writing as far as they are applicable to and not inconsistent with monthly tenancy; and so long as the relation of landlord and tenant exists in fact, the tenant is bound to pay the rent to his lessor.

When lease is complete.

A lease is considered as completed when the article or labour leased on the one side is ascertained, and the rent on the other [Grot. 3. 19. 7].

Obligations arising from contract.

From the contract of letting and hiring, the following obligations arise—

Lessor must give possession.

(1) On the side of the lessor, to give to the lessee possession of the thing let at the time fixed, in order

that he may have the use of it. For this purpose the lessee has an action against the lessor, which also extends to damages when the thing let is by the lessor's fault or neglect not put into the possession of the lessee [V. d. L. 1. 15. 12].

(2) To secure to the lessee quiet enjoyment of the thing let without molestation either by the lessor or others [V. d. L. 1. 15. 12].

Secure to lessee quiet enjoyment.

It has been held in South Africa [*Rex v. Stamp*, 1 Kot. Rep. 62] that the lessee can not only repel trespassers or *primâ facie* tortious interference with his rights, but also is protected in his rights against purchasers [Mor. Eng. and R.-D. Law, 142. But see p. 202 *ante*]. Whether a lessee can before entry proceed against a third party interfering with such entry as can be done in English Law by the person possessing an *interesse termini*, may be regarded as an open question [*Ibid.* 143].

Lessee's rights against trespassers, &c.

Where a lessor leases property belonging to another, and he cannot give the use, he is liable for all costs and losses. A contract whereby a man hires something of which the full ownership or the *usus* belongs to himself is considered as null and void [Grot. 3. 19. 5].

Letting of property of another.

The lessee is entitled to the use of the property or compensation for his interest in the same. He may compel the lessor to keep the property in a good state of repair so as to be fit for use. This the lessor must do at his own expense, and if in default the lessee may advance money for the repairs, and place it to account of rent [Ram. 1843–1855, 148], or may give up part of the property, and pay less rent in proportion to the time he is out of possession, or even claim back rent already paid. The lessee may claim compensation for loss caused by any defect in the property leased, if it was known to lessor, or, by reason of his profession, ought to have been known to him; otherwise, not. If by unexpected accident, such as fire, war, extraordinary unfruitfulness,

Rights of lessee.

or such like cause, the lessee is kept out of possession, the rent must be reduced according to the proportion between the time already expired and the period of non-occupation [Grot. 3. 19. 12].

Obligations arising from interruption of possession of tenant.

In an action for rent by landlord against tenant it is a good defence that the landlord did not implement the contract of letting by putting the tenant in possession of the property let, and if the tenant had advanced money by way of rent for the use of the premises of which the landlord had failed to put him in possession, he might recover the money so paid as money had and received by the landlord for the use of the tenant. Interruption by the landlord or any one under him of the tenant's enjoyment of the premises let is no answer to a claim for rent due and payable before such interruption, but it is ground for a tenant's claim to have the contract of lease cancelled and for recovery of damages consequent on the interruption. Interruption of a tenant by strangers after the tenant has been put in possession by the landlord is no answer to a claim for rent, unless such interruption was followed by eviction in due course of law, and it is then only an answer to a claim for rent that has become due after such interruption. Such interruption is no ground for a claim to damages or cancellation of the lease, unless it was followed by eviction in law, and due notice had been given to the landlord, in the proceedings terminating in eviction, to warrant and defend the defendant's title [*Per* Withers, J., in *Saibo v. Appuhamy*, 2 S. C. R. 126].

Tenant cannot question landlord's title—Exception.

A tenant, it may here be mentioned, cannot call in question the title of the landlord who let him into possession; but he may show (*a*) that he has been evicted by title paramount, and replaced in possession by the evictor; or (*b*) that the title of his landlord has expired [*Cooke v. Loxley*, 5 Term. Rep. 4; *Delaney v. Fox*, 28 L. J. C. P. 249; 15 C. R. C. 297].

(3) To maintain and keep the thing let in a proper state, so that the lessee may have the due enjoyment of it [V. d. L. 1. 15. 12].

He must maintain thing let in proper condition.

When the owner of premises known by him to be dangerous demises them in that condition without providing for their repair, he is liable for an injury which is the natural consequence of that dangerous condition. But where he lets the premises to a responsible tenant who enters into covenants to repair which include the source of danger, the liability is shifted to the tenant [*Todd v. Flight*, 30 L. J. C. P. 21; *Pretty v. Bickmore*, L. R. 8 C. P. 401; 15 C. R. C. 328].

When owner liable for dangerous condition of house let.

The duty of the landlord under the Roman-Dutch Law is to place the house in a proper and habitable state of repair, and if he fails to do so, the tenant can only require an abatement of the rent to the extent to which he has been deprived of the means of enjoying the occupation of the house, or has himself gone to expense in placing the house in a proper state of repair [De Villiers, C.J., in *Bensley v. Clear*, Buch (1878) 89. See Mor. Eng. and R.-D. Law, 147].

Lessor's liability to repair.

(4) To indemnify the lessee for all damages occasioned by any material defect in the thing let [V. d. L. 1. 15. 12].

To indemnify lessee for material defect.

(5) For the performance of the particular covenants in the lease [V. d. L. 1. 15. 12].

As to the obligations of the lessee—(1) He must punctually pay the rent according to the covenant in that behalf when fixed, and if not, then according to the custom of the place. The lessee is entitled to demand an entire remission of this rent or an abatement of part, according as he has had no use of the thing let during the whole or part of the time of the lease, unless this had been occasioned by his own act. To this head also appertains the case when, through inundation, tempest, or such like unavoidable misfortunes, the land has produced nothing [V. d. L. 1. 15. 12].

Obligations of lessee.

Abatement of rent.

Lessee's rights where land has produced nothing.

Ejectment when rent in arrear.

The lessor may eject the lessee from his house or land even within the time, if his rent is two years in arrear. A person who has undertaken to do a piece of work cannot claim his wages before the completion of the work, unless it was undertaken by the measure or by the day. The lessee being in arrear with his rent may be sued for the interest also in like manner as a negligent purchaser [Grot. 3. 19. 11].

Lessee cannot be ejected except through intervention of court.

It has, however, been held here that a lessee cannot be ejected by the lessor from the land leased for non-payment of rent, even though power to eject is given by the lease [Vand. D. C. 279].

According to the Roman-Dutch Law, a stipulation in a lease that if the lessee does not pay his rent regularly the lease should be determined is not contrary to public policy; but for non-payment of rent the lessor has no right to re-enter without an order of court. If he does so, the lessee is entitled to be restored to possession, and to recover damages for unlawful dispossession [*Silva v. Dassanaike*, 3 N. L. R. 248; 2 Br. 325].

Effect of provision rendering lease void, if lessor contravenes its terms.

Under the English Law, where a lease contains a provision that the lease shall become void, if the lessee does or omits to do something contrary to the objects of the tenancy, the effect of such act or omission is not of itself to avoid the lease, but to give the lessor the option of avoiding it; and the lease does not become void, until the lessor has exercised that option [Doe d. *Bryan v. Bancks*, 4 Barn. & Ald. 401; 15 C. R. C. 561].

Court may grant relief against clause for forfeiture.

The court has power in the exercise of its equitable jurisdiction to grant relief to a lessee against a clause of forfeiture and re-entry for breach of covenant to pay rent. In equity, the construction put on a clause of forfeiture of a lease on non-payment of rent is that it is a mere security for the payment of rent, and as the breach of that covenant is capable of a just compensation, a court of equity may award the compensation,

and abstain from enforcing the forfeiture [*Per* Lawrie, A.C.J., in *Sandford v. Peter*, 2 S. C. R. 35]. Where, however, a lessor does re-enter, he can have no further claim for rent not in arrear, but may recover damages actually sustained by the breach of the covenant to pay rent [*Saibo v. Cooray*, 1 S. C. R. 233].

Lessee who had made improvements allowed to remain on terms.

In the case of *Amarasinghe v. Abdul Cader* [2 Br. 397] a lessee who had effected valuable improvements upon his leasehold, but who had failed to pay any rent for a period of three years, upon being sued in ejectment, was allowed to retain possession on his paying up all arrears of rent, interest thereon, and the costs of the action, in spite of clauses in the lease that upon a failure to pay rent when due, the lease should terminate, and the lessee should not be entitled to claim compensation for improvements.

Lessee must use thing let for proper purpose.

(2) The lessee is bound to use the thing let for no other purpose than that for which it was let to him [V. d. L. 1. 15. 12].

Take care that thing let is kept in proper state.

(3) To take care that the thing is kept in a proper state, and is not misused [V. d. L. 1. 15. 12].

A lessee cannot convert pasture into arable land, although in the first years of a long lease he may do so [V. d. K. 680].

Liability of lessee for damage to property leased.

The lessee is bound to make good all damage caused to the leased property through his own delict or the negligence of his household or even by others out of hatred to the lessee. Ignorance of an art which a person practises, or even slight carelessness in matters which can only be handled with the greatest caution, is regarded as negligence. So also is fire, unless the lessee can prove unavoidable accident, in which case he is not liable to make compensation to the lessor except when a person stipulates for the safe keeping of the thing let, and except also when compensation for accident has been agreed upon, or when the accident happens owing to some default or neglect on the part

of the lessee of property or the lessor of labour. The lessor is also entitled to claim possession at the expiration of the lease, but not before, unless he requires his property in consequence of some unforeseen necessity, or unless the lessee makes a misuse of the property. The lessee may not give up possession before the appointed time. If by so doing any damage arise, he would be liable [Grot. 3. 19. 11].

Theft of thing leased.

A lessee of sheep who alleges that the flock has been driven off by robbers is not bound to make good the loss, if he can prove that the robbery happened without any fraud on his part [Voet 9. 2. 20].

Destruction by fire of thing hired.

So to an action to recover a jar hired by the defendant from the plaintiff, the destruction of the jar by fire through no fault of the defendant was held to be a good defence. The *onus*, however, in such a case is on the defendant to prove that the fire which destroyed the jar was caused by unavoidable accident [*Bastian v. Gabriel*, 1 S. C. R. 264].

Lessee's right against lessee on subsisting lease.

Where a person takes a lease of property to commence after the expiration of a subsisting lease, he can recover from the lessee on the subsisting lease damage done to. the property by such lessee after the execution of the lease in his [the incoming tenant's] favour [*Louis v. Balappu*, Ram. 1863–1868, p. 8], provided he has not withheld from the landlord rent, or sued the landlord for damages [*Juanis v. Dissanaike*, 2 N. L. R. 244].

Lessee to take care of trees on land leased.

A lessee is bound to take reasonable care of trees on the land leased [Vand. C. R. 128]; and the lessor may sue the lessee for permanent damage to the land even before the expiration of the lease [*Natchia v. Natchia* 1 Br. 380].

Lessee must return thing on expiration of lease.

(4) On the expiration of the lease, the lessee must return the thing undamaged to the lessor [V. d. L. 1. 15. 12]. A hirer of pasture land for a long term of years may not plough them in the last years [Grot. 3. 19. 14].

Notice to quit.

An ordinary monthly tenancy is often determined by a notice to quit given by the landlord. Great precision had at one time to be observed in giving such notice. It had to be usually one calendar month's notice; and it was held in *De Fonseka v. Jayewickreme* [1 S. C. R. 352; 2 C. L. R. 134] that the notice should be given before the commencement of the month at the expiry of which the tenancy was to be determined, so that the tenant should have time from the midnight of the last day of the month immediately preceding the month at the end of which the tenancy was to end to the midnight of the last day of the expiring month of the tenancy for the purpose of making fresh arrangements. And so notice given on the 31st July to quit on or before the 1st September following was held to be bad [*Markar v. Packeer*, 1 S. C. R. 61]. Notice given on the 31st January to quit at the end of February next [3 C. L. R. 96] and notice given in January to quit "on or before the 28th" [end] of succeeding month [*Muttiah v. Marian*, 3 N. L. R. 141] were held to be good.

Reasonable notice sufficient.

In the case of *Weeraperumal v. Mohamad* [3 N. L. R. 340], however, Bonser, C.J., held that under "The Small Tenements Ordinance, 1882," no notice to quit of any definite length of time was required, but the notice must be reasonable enough to admit of a tenant having an opportunity to secure another house; and hence, a monthly tenancy having commenced from the 15th of a month, a notice dated 12th February requiring the tenant to quit on the 15th March following was held to be sufficient and reasonable.

Disclaiming tenant entitled to no notice.

A tenant who disclaims holding under his landlord, and puts him at defiance, is not entitled to have the action against him dismissed for want of a valid notice to quit; and in such a case the plaintiff need not aver and prove any notice to quit [*Natchia v. Natchia*, 1 N. L. R. 21].

Increase of rent by notice.

As to increase of rent by notice, it has been held that the rent for use and occupation during the term the tenant overheld is not to be computed at the old rent, but is to be assessed at the fair value the use and occupation are worth; and that the increased rent mentioned by the landlord in his notice formed fair material on which to assess the rent for use and occupation [*Jacobs v. Ebert*, 6 S. C. C. 70; Wendt 307. See Vand. C. R. 151 and *Carnie v. Muncherjee*, 6 S. C. C. 100].

Where tenant has gained superior title.

Where at the termination of a holding the tenant has gained a title to the tenement superior to that of the landlord, he must still fulfil his obligation under his contract with the landlord, and restore to him the tenement, and then if the landlord in his turn refuse to give it up, the tenant can proceed to evict him by appropriate legal proceedings [*Mudianse v. Rahman*, 2 N. L. R. 235].

Detention of keys.

Where a tenancy has been legally determined by a notice to quit given by one party and accepted by the other, the mere detention of the keys by the tenant for two days after the determination of the tenancy does not amount to any evidence of use and occupation of the premises after the determination of the tenancy. [*Van Geyzel v. Vanderspaar*, 6 S. C. C. 68].

Lessee must perform other covenants.

(5) The lessee must perform the particular covenants which he is bound to either by law or the custom of the place or by the indenture of lease itself. For all these an action lies to the lessor against the lessee [V. d. L. 1. 15. 12].

Lessee must pay taxes, &c.

Ordinary taxes imposed by the State, towns, and villages upon the fruits must be borne by the lessee. All others by the lessor, unless it has been otherwise provided by the law or by agreement [Grot. 3. 19. 15].

House tax.

In the absence of an agreement or statutory provision, or local custom, house tax, meaning, presumably, a tax analogous to the present municipal taxes, is payable by the tenant [Ram. 1822–1833, p. 128].

Among the special consequences of this contract is the lien which the lessor or landlord has upon the crop produced from the land, and on the movable property brought on the premises for his arrears of rent. For this the law gives him the privilege of a legal and preferent mortgage whereof also he may avail himself by arrest or distress [V. d. L. 1. 15. 12]. Lien of lessor.

Lessors of land have a tacit mortgage over things brought and carried into such lands and the fruits growing thereon. This right should be exercised, or, in order to preserve it, the things should be put under arrest before they are carried away from the land. At some places it may be exercised even within a month after the removal [V. d. K. 423]. The right really is a right of retention which is confirmed by the arrest [V. d.K. 453]. See further as to this right of tacit hypothec, p. 419, *et seq. ante*].

The landlord's lien is privileged, and has preference over the claims of a prior special mortgagee [Vand. D. C. 103]. It extends to property deposited in the house occupied by his tenant for the permanent use of the latter [*Gooneratne v. Annamaley*, 3 Br. 211]. The landlord does not by accepting from his tenant promissory notes for the amount of rent due lose his preferent legal hypothec over the *invecta et illata* [*Ex parte* Austin, Ram. Rep. 1872-1876, 18]. Landlord's lien has preference over prior special mortgages. Hypothec not lost by acceptance of promissory note.

Where furniture was given by the plaintiff to A on the purchase-hire system, and A being a tenant of the defendant went into arrears of rent, and the defendant removed the hired furniture from A's house to another house for greater security, it was held that the defendant was entitled to retain the furniture, until the rent due to him was paid, unless it could be shown that it was brought into the house not for permanent use, but for a temporary purpose; and that the removal of the furniture by the landlord from A's house to another house for greater security did not terminate the right Furniture given on the purchase-hire system. Removal by landlord of furniture for better security.

of retention [*The Anglo-Oriental Furnishing Co. v. Samarasinghe*, 7 N. L. R. 12].

Landlord has no right to lock up house to enforce lien.

A landlord has no right to lock up the house of his tenant, and exclude him from the beneficial enjoyment of the leased premises, either to enforce his lien or to prevent the tenant from removing the goods from the premises, nor can he, if he makes a distress for rent, exclude the tenant from any part of the demised premises. A substantial interruption by the landlord of the enjoyment of demised premises discharges a lessee from liability to pay rent, except what has accrued due; and entitles him to claim annulment of the contract of lease and damages, if any, for the interruption [*Marikar v. Bell*, 1 S. C. R. 237 ; 2 C. L. R. 94].

When lease ceases.

The term for which anything is hired ceases or stops—

(1) When the term for the lease expires.

Continuance of lease by occupation.

The lease of a house, whether the contract was originally in writing or not, will continue after its termination so long as the lessee continues to occupy it [V. d. K. 671].

Where a lessee remained in the enjoyment of the property leased after the termination of the lease, some jurisconsults maintained that the rent did not extend beyond the time of the actual occupancy by the tenant after the expiration of the term [Grot. Tr. Herb. 360, n.].

(2) When the thing let is by unforeseen misfortune destroyed, as, for example, when a house is burnt [V. d. L. 1. 15. 12].

(3) By Merger, when the lessee succeeds to the inheritance of the lessor.

(4) When the lessor himself has an absolute necessity for the thing [V. d. L. 1. 15. 12 ; Voet 6. 3. 48. and 13. 5. 9]. He must require the property for some special purpose arising from some unforeseen cause [Mor. Eng. and R.-D. Law, 162].

Insolvency of lessee.

(5) Although the hire or rent does not cease by the death of the lessee, yet, in the case of insolvency, it does

not go beyond the first coming usual period of removing, or giving up the occupancy [V. d. L. 1. 15. 12].

Sale of thing let.

By the sale of the thing let, the lease does not become void, the rule being "hire goes before sale" [V. d. L. 1. 15. 12]. A purchaser must continue a lease granted by his vendor [Grot. 3. 19. 16]. This differs from the Roman Law which on this point was observed in Vriesland, unless the vendor has bound the property leased or all his property in general for the security of the lease [Grot. Tr. Maas. 398, n.].

Certain other grounds terminating lease mentioned by Voet.

One of the reasons given by Voet [19. 2. 25] for the lessee's considering the lease at an end is the lessor's alienation of the property before the expiration of the lease. This, however, although in accordance with Roman Law, is contrary to the general current of Dutch authority. Another case in which Voet considers there is a ground for non-payment of rent and for the lessee's terminating the lease is his being put to great inconvenience, as by the lessor's making necessary repairs, or where a person who has hired a dining room finds that his lights are entirely obscured, the inconvenience being of a serious description [Voet 19. 2. 18]. It is doubtful, says Mr. Morice, whether a court in South Africa would go so far as this [Mor. Eng. and R.-D. Law, 150].

Other cases in which lessee may be ejected without compensation.

Other cases given by Voet [19. 2. 16] in which the lessee may be ejected without compensation are—(1) where the property needs such repairs as cannot be undertaken when it is occupied; (2) when the lessee makes a grossly improper use of the property; (3) when the lessee for the space of two whole years has made default in the payment of the rent; (4) when a usufructuary or trustee has let property, and by his death or otherwise the right to let it has come to an end before the expiry of the term of the lease; (5) if the lessee has leased land from enemies who were in temporary possession of it by right of war, and the land has

reverted to the State [see Mor. Eng. and R.-D. Law, 162].

Implied condition in lease.

If it appears from the terms of a lease that the fulfilment of certain stipulations are conditions of the lease, the courts will enforce forfeiture. An undertaking not to sublet has been held to amount to a condition the breach of which entitles the lessor to re-enter the property leased, although it is not specially provided in the lease that a breach of its conditions should give a right of re-entry [*Ibid.*].

Purchase of property subject to lease.

Liability of tenant of a house to lessee of land whereon it stands on lease from owner of land.

A purchaser of property subject to a lease acquires a right to the rents and profits of such property accruing after such purchase without any assignment of the contract of lease [*Allis v. Sigera*, 3 N. L. R. 5]. But where the tenant of a house paid the owner of the land whereon it stood rent for occupation of the house, and the owner leased the whole land on a notarial lease for a term of years, it was held that on the strength of the lease only the lessee could not maintain an action against the tenant for ground rent; and that the tenant would not be liable except by attornment to the lessee or by express assignment to the lessee by the owner of the land of the benefit of his contract with the tenant with due notice to the tenant of such assignment [*Wijeratne v. Hendrick*, 3 N. L. R. 158].

Recovery of small tenants under Ordinance No. 11 of 1882.

Ordinance No. 11 of 1882 makes provision for the speedy and effectual recovery of the possession of tenements unlawfully held over after the determination of the tenancy. The term "tenement" here means a house or other building or any part thereof rented or which may be rented, exclusive of all taxes, rates, and assessments, at a sum not exceeding twenty rupees a month [sect. 2]. When the interest of the tenant in a tenement has ended, and he neglects to quit it, the landlord may file an application supported by an affidavit in the Court of Requests, and obtain a rule *nisi* on the tenant to show cause why he should not deliver up

possession of the tenement to the applicant. In case of default on the part of the tenant the court may issue a writ of possession for the ejectment of the tenant and restoration of the possession of the tenement to the landlord [sect. 3].

Tenant showing cause.

In the event of cause being shown by the tenant the court should settle and record the issues that arise between the parties, and try and determine the same on a day to be appointed for the purpose [sect. 5].

Arrest of execution.

The tenant may arrest the execution of the writ of possession by giving security to sue within two months in a court of competent jurisdiction the landlord to have the tenant's claim to immunity from ejectment from the tenement sustained [sect. 6].

Contract of *Erfpagt gunning*.

The contract known to Roman-Dutch law as *Erfpagt gunning* has a great resemblance to that of sale, and also to that of hire. It takes place when any one grants to another an estate of inheritance in certain lands, on paying yearly some quit-rent or offering in acknowledgment of the original title of the grantor. This right reserved to the grantor as an imperfect species of property is of a real nature, but the contract whereby this right is granted induces personal obligations [V. d. L. 1. 15. 13].

The grantee of the land is entitled to enjoy its fruits in the same manner as a usufructuary, and therefore is subject to all its charges. The grantor of the land is entitled to demand, yearly, the quit-rent as an acknowledgment of his ancient title and the holding under him as lord, and if the grantee be three years in default it works a forfeiture to the lord [V. d. L. 1. 15. 13].

Purchase-hire system.

The use of property on what is known in modern times as the "purchase-hire system" similarly partakes of the nature of sale and of hire. The agreement for such use is usually as follows—"I, A.B., hereby engage on hire from C. D. for a period of two years a ——— at Rs. ———, which sum I agree to pay in monthly

instalments of Rs. ——— in advance from the date hereof to the said C. D. And I further agree, in case of any instalment being unpaid at the expiration of fifteen days after it is due, to return and deliver up possession of the said ——— in good order and condition, ordinary wear and tear excepted, to the said C. D. or his order at ———, and to pay all hire due up to the date of such return on demand. I, C. D., agree on payment of the sum of Rs. ——— in monthly payments as aforesaid to relinquish all right and title to the said ——— in favour of the said A. B." This is an agreement to hire the thing named, not to buy it; and A. B. is not to be treated as a "mercantile agent," with power to sell under sub-section 2 of section 24 of Ordinance No. 11 of 1896 [*Cave & Co. v. Clay*, 4 N. L. R. 30].

Hire of services.

Besides the use of things, mercenary (though not other) services may also be given on hire, whether those of freemen or of slaves; but not such as are called "liberal," that is, the services of advocates and the like, to whom not hire but salary is paid [Voet 19. 2. 6].

Services of advocates.

Advocates might recover remuneration.

As observed already [see p. 486] attornies at law and advocates might recover remuneration even in the absence of a promise. Advocates are liable for fraud or malice, but not for unskilfulness or error of law or fact. They cannot withdraw from a just cause nor court practice nor agree for payment on victory only [Voet 3. 1. 10, 12. See further p. 485, *ante*].

Not liable for unskilfulness, &c.

Assignment of advocates.

It may here be observed that an advocate may by the court be assigned to suitors too poor to retain counsel. Usually junior advocates are so assigned, the judge taking care that the cause is not prejudiced. Only two counsel were allowed to plead on the same side, although more might advise. When the number of advocates on the roll was small, one party was not allowed to exhaust it by retaining all on his side [Voet 3. 1. 11. See *Perera v. White*, 4 N. L. R. 209].

Number allowed to appear on one side.

As regards professional men it may be observed that so long as a professional man's opinion is a faithful and honest one, and founded on a due exercise of reasonable professional skill, the person calling for it is bound to pay for it, whether it happens to be erroneous or not in fact. So a surveyor may be entitled to his fees for work done though inaccurate [*Williams v. The Ceylon Co., Ltd.*, 3 Br. 127].

Professional man entitled to fee, though opinion unsound.

As already observed, services termed by Voet "mercenary" may be given on hire. Thus, the services of menial, domestic, and other servants and labourers may be engaged for hire. Ordinances Nos. 11 of 1865, 16 of 1884, 13 of 1889, and 7 of 1890 make provision for the amendment and consolidation of the law relating to servants, labourers, and journeymen* artificers under contracts of hire and service.

Services of domestic servants and labourers.

A clerk as such is not a domestic servant, and is not entitled before dismissal to a month's notice or a month's wages, unless the terms of his engagement were on the footing of the custom as to month's notice or month's wages usually governing the contracts of domestic servants with their employers [*Wijesinghe v. Reyan*, 2 C. L. R. 93]. A clerk must give reasonable notice expiring at the end of the current month of his intention to determine the engagement [*Schokman v. Thompson*, Ram. 1863–1868, 188]. A clerk is liable to dismissal for absence from office without just cause. Where a clerk wrote a letter to his employer in which he expressed the hope that he would be excused, and absented himself from office, it was held that the employer was justified in dismissing him [*Silva v. The Colombo Gas and Waterworks Co., Ltd.*, 5 S. C. C. 216].

Clerk not domestic servant.

Clerk must give reasonable notice.

Clerk liable to dismissal for absence from work.

The tindal of a boat is not a servant within the meaning of Ordinance No. 11 of 1865 [Vand. 53], nor

Tindal of boat.

* Journeyman — Literally, a person hired to work by the day [French, *Journée*, a day, a day's work]. Hence, any mechanic who is hired to work for another by the month, year, or other term.

Person employed to drag nets.

Dhoby.

is a person who by a written contract undertakes for wages to attend at certain places for and in the work of dragging nets cast into the sea [*Rodrigo v. Mel*, 1 N. L. R. 91], nor is a dhoby ordinarily [*Falls v. Sama*, 5 S. C. C. 119. But see P. C., Galle, 82,759, Gren. 1873, P. C. 11] a servant under that Ordinance.

Monthly contracts.

Every verbal contract for the hire of any servant except for work usually performed by the day, or by the job, or by the journey, unless otherwise expressly stipulated, is deemed to be a contract for hire for one month renewable from month to month. It is deemed to be so renewed, unless one month's previous notice or warning is given by either party to the other of his intention to determine the same at the expiry of a month from the date of such notice [Ord. No. 11 of 1865, sect. 3].

Wages payable monthly.

How to be computed.

The wages of such servant are payable monthly, except where the services are determined by notice on a day other than the last day of the month, in which case the wages for the broken period are payable to the day the service is so determined. The wages, where the same are not payable at a monthly rate, must be computed according to the number of days on which the servant has been able and willing to work; or, if payable at a monthly rate, in proportion to the number of days on which he has been able and willing to work. An employer may discharge his servant without previous notice, if he instantly pay his wages for the time he has served, and also for one month from the time of discharge. A contract of service may at any time be determined by the misconduct of either party [sect. 4].

Hire of journeyman artificer.

A verbal contract for the hire of a journeyman artificer is a contract for one day only [sect. 5].

Contract for more than a month to be in writing.

A contract of service for a period longer than one month is invalid, unless it is in writing signed or acknowledged by the parties before a police magistrate, or a justice of the peace, or other person expressly

authorised by the Governor, the justice or other person not being himself the employer of the servant. As a general rule, a contract of service is not valid if made for a period longer than three years [sect. 7].

Contracts entered into in India.

Contracts entered into in India for the hire and service in this Island of servants and journeymen artificers are valid, if they be in writing, and signed or acknowledged by the parties thereto or their agents, and are in accordance with the laws in force for the time being in India [sect. 9].

When contract may be determined sooner than stipulated for.

A contract of service in writing under the Ordinance is determinable before the expiration of the period specified therein by mutual consent expressed in writing, signed or acknowleged by the parties in the presence of two witnesses. It may also be determined, if the party contracting to be employed is convicted of an offence, or becomes a prisoner, or permanently disabled from completing his contract [sect. 10].

Contract may be entered into through agent.

A contract of service to be valid under this Ordinance need not be entered into between master and servant personally, but may be made with the servant by the duly authorised agent of the master [*Cathcart v. Murugan*, 9 S. C. C. 4].

Master cannot transfer contract.

A master has no right to transfer to another his servant's contract of service with him without the servant's consent [*Bowen v. Pannum*, 1 S. C. R. 94].

Master bound to provide servant with work where he is to be paid for working days only.

In *Colville v. Ramasami* [2 S. C. C. 94], Phear, C.J., thought that in a contract of service from month to month made between employer and labourer by parol which contains a term that the servant is to be paid at a specified rate only for every day that he works, a corresponding term will be implied on the part of the employer, unless the contrary is expressed between the parties to furnish the servant with work, or to give him the opportunity to work on all usual working days during the period of the service.

"Journeyman artificer."

"Journeymen artificers" under the Ordinance means all skilled workmen in the regular employment of an employer who are in law presumed to work by the day or who are engaged for a given time, including those who contract to serve by the month. A machine-ruler in a printing office who has entered into a contract of monthly service is a journeyman artificer within the meaning of the Ordinance [*Cave v. William*, 2 S. C. R. 157 ; 3 C. L. R. 47] and so is a coach-builder who enters into a contract for a term of service under his employer [*Jansz v. Sinno*, 2 Br. 251]. A "journeyman artificer" under the Ordinance means an artificer in the regular employ of an employer. So, a person who is by trade a clock repairer, and who repairs clocks at his own house for remuneration, cannot be charged under the Ordinance as a journeyman artificer for neglecting work undertaken by him [*Samuel v. Gabriel*, 6 S. C. C. 149].

Machine-ruler.

Coach-builder.

Clock repairer

Contract not in accordance with section 7 not absolutely void.

The 7th section of the Ordinance does not render a contract of service for a term certain absolutely void, although such contract does not comply with the provisions of the section, but only void so far as regards the subjecting of any party thereto to the provisions of the Ordinance for not performing the same ; and so, where a servant entered into a contract of service with his master for a year certain, and the parties did not contract in the form provided by the section, it was held that the contract could not be treated as a nullity, and the servant punished under the 11th section as a servant under a monthly contract of service [*Collinson v. Veeramuttu*, 6 S. C. C. 135].

Servant guilty of neglect, &c.

A servant or journeyman artificer failing to attend at the time and place agreed upon to do his work, or leaving unfinished, or refusing to finish any work contracted to be done, or being guilty of drunkenness, wilful disobedience of orders, insolence or gross neglect of duty or other misconduct, or quitting service prematurely without leave or reasonable cause, is

punishable by forfeiture of wages or imprisonment or both at the discretion of the court [sect. 11].

Similarly, a servant who being engaged to go on a journey refuses or neglects to do so, or is guilty of misbehaviour, is punishable with forfeiture of wages and imprisonment [sect. 12].

Master cannot stop wages for misconduct.

The wages of a servant may be forfeited by an order of court, but a master has no right to stop any portion of his servant's wages for misconduct [*Appu Sinho v. Coults*, 1 C. L. R. 32; Ram. 1860–1862, 193].

When servant is in custody of law, he is no longer in his master's service.

When a servant is in the custody of the law, *e.g.*, under arrest, he cannot be said to be in the service of his employer. He cannot, hence, be guilty of insolence for the use by him, when in such custody, of abusive language towards his master [*Maclean v. Appan*, 2 N. L. R. 54].

Conviction of servant of quitting service does not terminate contract.

The conviction and imprisonment of a servant under section 11 of the Ordinance for unlawfully quitting his master's service does not of itself terminate his service [*Hunt v. Muttan*, 4 S. C. C. 3].

Employer not acting up to the contract.

An employer who without reasonable cause refuses payment of wages, or, generally, to act up to the contract, is punishable with fine and imprisonment [sect. 14].

Effect of wages remaining unpaid.

No servant or journeyman artificer is liable to punishment for neglecting to work or for desertion, disobedience, or neglect of duty, if his wages remain unpaid for longer than a month [sect. 21].

Further provisions of Ordinance.

The Ordinance, further, makes provision against persons giving false characters to servants, and servants making false statements as to former employment, against seducing servants and harbouring and concealing them and such other acts [sect. 15 *et seq.*].

Indian coolies.

Ordinance No. 13 of 1889, as amended by Ordinance No. 7 of 1890, relates to Indian coolies employed on Ceylon estates. Except, however, as is otherwise expressly provided in this Ordinance, the provisions of

Ordinance No. 11 of 1865 apply to "labourers and employers" under it [sect. 4].

Contract to be deemed to be for a month.

Every labourer who enters into a verbal contract for work not usually done by the day, or by the job, or by the journey, or whose name is entered in the check-roll of an estate, and who has received an advance of rice or money from the employer, is, unless he has otherwise expressly stipulated, and notwithstanding that his wages are payable at a daily rate, to be deemed to have entered into a contract of hire and service for one month, renewable from month to month. Every such contract is deemed to be so renewed, unless one month's previous notice is given by either party to the other of his intention to determine the same at the expiry of one month from the date of such notice [sect. 5].

When wages are payable.

The wages of a labourer are payable monthly, within sixty days from the expiration of the month during which such wages have been earned. When such wages are payable at a daily rate, the monthly wages are to be computed according to the number of days on which the labourer has been able and willing to work, whether the employer may or may not have been able to provide him with work. The employer, however, is not bound to provide for each labourer more than six days' work in the week [sect. 6 (1)].

and how to be computed.

All wages payable when contract is determined.

When the contract is determined by a month's notice, all wages due for the period of service are payable in full on the day when the contract is so determined [sect. 6 (2)].

Advances to labourers.

In computing the amount of wages for any period of service, the labourer may be debited with the amount of all advances of money made to him and with the value of food, clothes, or other articles supplied to him during such period, which the employer is not liable in law to supply at his own expense [sect. 6 (3)].

Effect of failure to pay wages.

No labourer is liable to punishment for neglecting work or quitting service without leave or reasonable

cause, or for disobedience or neglect of duty, if the monthly wages earned by him have not been paid in full within the period specified above [sect. 7].

The provisions of this section apply not only to monthly labourers as defined by the Ordinance, but to those who, under written agreement, have contracted to serve for a longer time [*Mackenzie v. Leda*, 2 N.L.R. 231].

Contract for more than a month.

No contract of service for a period longer than a month is valid unless it is executed as required by Ordinance No. 11 of 1865 [sect. 8 ; p. 612 *ante*].

Wages, a first charge on estate.

Wages to the extent of Rs. 20 in the case of each labourer are a first charge upon the estate, having priority over the claims of all other creditors, and this first charge may be enforced by suit, if instituted within three months of the last day of the period in respect of which such wages are claimed [sect. 9].

Wages may be sued for in Court of Requests.

The wages, whatever may be the amount due, may be sued for in a Court of Requests having in other respects jurisdiction, and one or more labourers may institute one suit to recover wages due not only to him or them, but also to any other labourer or labourers employed on the same estate, provided the court is satisfied, after due inquiry, that the labourer or labourers suing is or are authorised to sue on behalf of the others also [sect. 10].

Rights of mortgagees.

The mortgagee of an estate may pay and discharge the first charge aforesaid ; and he will then be entitled to add the amount thereof to the sum due upon his mortgage which will then be secured by the mortgage [sect. 18].

Further provisions.

The Ordinance, further, makes provision for steps to be taken, and as regards the rights of parties, in suits instituted as aforesaid, and for returns to be made by the employer as to the labour force in his estate [sect. 14 *et seq.*].

Registration of domestic servants.

Ordinance No. 28 of 1871 makes provision for the registration of domestic servants.

SUB-SECTION VIII.

Compromise.

Definition.

Compromise [*Transactio*] is an agreement between litigants for the settlement of a matter in dispute [Grot. 3. 4. 2].

Who may enter into compromise.

Whoever may promise may also compromise. An agent may not do so on behalf of his principal except by special authority, unless he is *procurator in rem suam*, or has the free management of another's property.

Guardian may compromise for ward.

Guardians may compromise on behalf of their wards, provided they do not thereby effect an alienation of the ward's property [V. d. K. 517 ; Grot. 3. 4. 3].

Procurator or attorney cannot.

A procurator or attorney cannot rightly compromise, unless he has a special power or a general power with perfect freedom of administration [Voet 2. 15. 3]. A husband may compromise in matters relating to his wife's property [Voet 2. 15. 5.]; and one of many parties to a suit may compromise as to his share without the consent of the others [Voet 2. 15. 6].

Right of husband to compromise.

In the case of a doubtful *fidei commissum* the fiduciary may compromise so as to bind the fidei commissary [Voet 2. 15. 8]. But here it must be clear that there is a doubt as to the construction of the *fidei commissum*, and there should be no fraud nor the remission of a clear right [*Ibid.*].

What may be compromised

All matters in dispute may be compromised except future maintenance; and differences arising out of a last will not otherwise than after the terms of the will have been read over [Grot. 3. 4. 4].

A compromise in respect of a matter already decided by the sentence of a judge which cannot be appealed against is not valid [V. d. K. 518].

In the case of aliment left by testament a compromise may be entered into as regards so much as has become overdue, but there can be no surrender of future rights [Voet 2. 15. 14]. Aliment left by testament.

Compromises may be entered into in relation to judgments already delivered [Voet 2. 15. 11], and the effect of a compromise is to destroy the judgment or the lawsuit, if entered into before judgment, to the extent of the compromise [Voet 2. 15. 21].

Since in Holland the prosecution of crimes belonged to the Sovereign, persons specially injured by a crime might freely compromise the same [Grot. 3. 4. 5]. This referred to past crime or crime already committed. There could be no compromise as to future, contemplated, or threatened crime [Voet 2. 15. 16]. Crimes.

Compromises may be made judicially or extra judicially, simply, or conditionally, and also with the stipulation of a penalty against the party who breaks it [Grot. 3. 4. 6]. They must, however, be clearly and definitely provable [Voet 2. 14. 1]. How made.

Compromises not only give the defendant a right of exception, but also a right of action for the recovery of what has been promised, and this holds good even when one or other of the parties thinks he has discovered fresh evidence [Grot. 3. 5. 8]. Effect of compromise.

A compromise cannot, in the absence of fraud or deceit, be avoided on the ground of *enormis læsio* [Voet 2. 15. 24].

SUB-SECTION IX.

SURETYSHIP.

Definition.

A SURETY is a person who for the greater security of a debt binds himself by a promise for a principal debtor. He is, co-obligor, and his obligation is personal and accessory to that of the chief obligor [Grot. 3. 3. 12; V. d. L. 1. 14. 10].

The engagement of a surety, says Pothier, is a contract by which a person obliges himself on behalf of a debtor to a creditor for the payment of the whole or part of what is due from such debtor, and by way of accession to his obligation [Poth. 2. 5. 1].

In Ceylon, no promise, contract, bargain, or agreement which is not in writing and signed by the party making the same or by some person thereto lawfully authorised by him, is of force or avail in law for charging any person with the debt, default, or miscarriage of another [Ord. No. 7 of 1840, sect. 21].

Who may be surety.

All persons competent to make a promise may also become sureties even though under guardianship, provided they can exercise their understanding, that is, if it is done with the consent of their guardians [Grot. 3. 3. 12, 13].

Minor cannot be surety even though emancipated.

It is necessary that the surety be capable of contracting, and obliging himself as such. Minors cannot, therefore, be sureties. Even a minor who has obtained letters of *venia ætatis* or who carries on trade openly is not competent to be a surety. His power of contracting is limited to those contracts that are necessary to be entered into in the administration of his own affairs. The engagement as surety is deemed to be no part of this administration [Poth. 2. 6. 31].

A person may, however, engage as surety even for infant children in cases where they can contract a valid obligation, without any act of their own; for instance, where one has conducted the affairs of an infant child with advantage, he is entitled *ex quasi contractor* to be reimbursed what he has expended in doing so, and therefore a person may engage as surety for the performance of this obligation [Poth. 2. 6. 4. 1]. Person may be surety for infant children.

A surety cannot engage for the performance of obligations *contra bonos mores*. If, for instance, a person employs me to commit a crime, and undertakes to indemnify me against all the consequences of it, and to give me a certain recompense, another cannot effectually engage as surety for such an obligation—*malificiorum fideijussorem accipi non posse.* But after the act is committed, a person may enter into a valid obligation as surety for the reparation of the injury [Poth. 2. 6. 4. 2]. Obligations *contra bonos mores.*

Among the incidents of the contract of suretyship are the following—(1) That there can be no binding obligation on the part of the surety, unless there exist a legal binding obligation on the part of the principal debtor. (2) That the surety does not release the principal debtor from his obligation, but merely binds himself as a collateral security for the debt. Herein a surety differs from him who undertakes the debt of another. (3) That a surety cannot effectually bind himself further than to the whole or part performance of the same thing to which the principal is bound. (4) That a surety cannot bind himself for more than the principal debtor is bound though he may for less, whether this excess respect the amount of the principal debt or the condition of the debt. And even should he do this, he would still be liable only to the extent of the principal obligation and no further. (5) That the cancelling of the principal obligation extinguishes also at the same time that of the surety, and that all Incidents of contract. Difference between surety and one who undertakes debt of another.

grounds of defence on the part of the principal debtor against the creditor, as fraud or violence, are available also to the surety, unless this defence be confined to the person of the principal debtor, as when he has made a cession of his property, and is thus freed from any personal action till he is in better circumstances. In this case, which is analogous to insolvency of the present day, the surety remains liable. (6) The security is extinguished by the two characters of principal debtor and surety becoming united in the same person, as when the one becomes heir to the other [V. d. L. 1. 14. 10].

Consideration for contract of suretyship.

Under the English law a consideration is necessary to give validity to a contract of suretyship, unless the contract be by deed under seal. It is not, however, necessary that the surety should himself obtain any benefit from the contract. The benefit to be derived may be entirely that accruing to the principal debtor. Thus, the consideration for A contracting with B to act as a surety for C may be merely B's advancing money to C or B's giving C a certain extension of time in which to pay an already existing debt [Mor. Eng. and R.-D. Law, 94]. As to the necessity of consideration under the Roman-Dutch Law see p. 478 *supra*.

Surety entitled to any set-off that principal debtor may claim.

The contract of suretyship being a contract of indemnity to pay what may be due by the principal debtor, the surety is entitled to any set-off that the principal debtor could have claimed [*Ibid.*, p. 96].

Surety who expresses extent of obligation is not bound generally.

When a surety has expressed for what sum or for what cause he has bound himself, his obligation only extends to the sum or to the cause so expressed ; for instance, where one binds himself as a surety for a tenant for the payment of his rent, he will not be bound for the other obligations of the lease, such as those which result from the want of repairs, &c. If a person engages as surety for a principal sum, he is not bound for the interest. On the other hand, when the terms

Surety in respect of principal sum, not bound for interest.

of the engagement are general and indefinite, the surety is understood to be obliged for all the obligations of the principal debtor resulting from the contract to which he has acceded. He is supposed to have engaged *in omnem causam*. If, for instance, the engagement by which a person has become surety in my favour for my tenant expressed in general terms that he has become surety for the lease, he will be bound not only for the payment of the rent, but generally for all the obligations of the lease, such as those in respect of repairs, &c. A person who engages as surety in general terms is also bound not only for the principal due by him on whose behalf he is obliged, but also for the whole of the interest which may be due. But, however extensive and general an engagement may be, it only extends to the obligations which arise from the contract itself for which the surety is obliged, and not to those which arise from an extrinsic cause. So, a person who becomes surety for an administrator of the public revenues is only obliged for the restitution of the public money, and not for the penalties to which the administrator may be condemned for malversation. In general, the engagement does not extend to the penalties to which the debtor has been condemned [Poth. 2. 6. 5].

Where terms of engagement are general.

Surety bound for obligations which arise from the contract only.

It is a question, says Pothier, whether the surety's engagement is entirely null, when he is obliged in more than the principal, or whether it is only null so far as it exceeds the principal obligation. According to better opinion a surety who obliges himself to a greater sum than that included in the principal obligation, or who obliges himself to pay immediately what the principal only owes at the end of a certain term, or under a certain condition, is under a valid obligation to pay the sum included in the principal obligation at the time and under the conditions there mentioned [Poth. 2. 6. 1].

Engagement of surety for more than the principal debtor.

Discharge of principal obligation by novation, release, &c.

Whenever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise. He is also discharged by the novation of the debt. So, when the principal debtor becomes the sole heir, purely and simply, of the creditor, or, *vice versâ*, when the creditor becomes sole heir purely and simply of the principal, or when the same person becomes successively heir of one and the other, the sureties are liberated [Poth. 2. 6. 1].

How obligation arises.

The obligation of surety arises either from special contract and agreement, or by virtue of law, for example, in the latter case, the liability of usufructuary for the restoration of the property in which he has a life interest; or it arises by order of the judge, as when moneys which have been deposited in court by one party are taken out by the other on security [V. d. L. 1. 14. 10].

Surety or bail which can be justified.

When the obligation of suretyship arises not from contract, but by operation of law, or by decree of the judge, the party must be a solvent person and within the jurisdiction of the place either by person or property. This is termed a surety or bail which can be justified. In case such surety becomes insolvent, the debtor is bound to provide another [V. d. L. 1. 14. 10].

Who are prohibited from being sureties.

Among those persons who are especially prohibited from becoming security for others are females, whose engagements of this nature are rendered void by the law termed *Senatus Consultum Velleianum*, even when they become sureties for their husbands. However, it is universally received in practice that women may renounce this privilege [V. d. L. 1. 14. 10; Voet 16. 1. 1, 9].

Women are not allowed this privilege if they have attempted to defraud any one, for example, by giving themselves out as being co-principal debtors, if and in

so far as, they got anything by the transaction, as also if they have become surety for one to whom they were indebted, or if they have continued their suretyship after the lapse of two years by a renewed promise or assurance [Grot. 3. 3. 14–18].

As to married women being surety for their husbands, this was prohibited by special laws in Holland in cases of money lent [*beneficium authenticæ si qua mulier*] except in so far as such debt might be found to be for their benefit. This privilege of women remained intact, even though they had renounced the *beneficium senatus consulti velleiani*, unless they had renounced this special privilege [Grot. 3. 3. 19]. Married women as sureties.

We may become surety for any debt and for the benefit of any creditor whatsoever, without regard to the nature of the principal obligation, whatever it may be, unless it be invalid by law [V. d. L. 1. 14. 10]. We may also become security not only for the principal obligation, but also for a former surety which is termed *post* surety, and further not only for an obligation already in *esse*, but for one *in futuro* [*Ibid.*]. For whom one may become surety. *Post* surety.

To render a person liable under a contact as a surety, his intention to bind himself as security by it must clearly appear. To say that a person is a good man, and one who, no doubt, will pay, does not amount to the obligation of a surety [V. d. L. 1. 14. 10; Grot. 3. 3. 25]. Mere recommendation does not induce suretyship.

In construing the words of a security bond, we must carefully attend to the extent of their signification. If they are general and unlimited, the surety is to be considered to have bound himself to all the obligations of the principal debtor arising from the original contract for which he has become security; but however extensive and universal a security may be, it cannot be extended beyond the obligations arising from the contract itself or to anything *dehors* the contract [V. d. L. 1. 14. 10].

Sureties not to bind themselves for more than principal debtor.

Sureties may not bind themselves for more than the principal whether as to subject-matter, time, place, or other particular, but may to less, and also conditionally or from, or up to, a certain time, in which last case, when the time arrives, the surety ceases to be bound, although the principal still remains liable [Grot. 3. 3. 23].

Where a surety has engaged himself for a larger sum than that in which the principal has become bound, he would be liable to the extent of that sum, if the debtor subsequently becomes indebted therein [V. d. K. 499].

When suretyship may be entered into.

The suretyship may be entered into at the same time that the principal binds himself, and also before or after. It is effected like other verbal obligations by promise and acceptance [Grot. 3. 3. 25].

The obligation of a surety passes against his heirs [Grot. 3. 3. 27].

How securities are extinguished.

Securities are extinguished and become void in the same way that other obligations do. A surety, however, is not released by the mere circumstance of the creditor having granted an indulgence in delay of payment to the principal debtor without the concurrence of the surety; since, if he was unwilling to remain longer bound, he should have given notice to the creditor [V. d. L. 1. 14. 10].

Granting time to debtor.

Security discharged by creditor accepting an estate in payment.

A surety is also discharged when the creditor has voluntarily received from the debtor an estate in payment of a sum which is due to him, although the creditor is afterwards evicted from the estate [Poth. 2. 6. 1].

Transaction between creditor and principal debtor, whereby rights of surety are altered.

Under the English law, a transaction between the creditor and the principal debtor whereby the rights of the surety are altered without his consent—such as a binding agreement to give time without expressly reserving the creditor's right against the surety—discharges the surety. And the rule applies in every case where, at the time of the transaction, the creditor has notice that the relation between the debtors is one of

principal and surety, although at the time of the constitution of the debt they may both have been interested in the consideration [*Bank of England v. Beresford*, 6 Dow. 233; *Rouse v. Bradford Banking Co.*, 63 L. J. Ch. 891; 21 C. R. C. 645].

By law there are various considerable privileges given to sureties— **Privileges of sureties.**

(1) The *beneficium ordinis seu excussionis*, whereby the surety may throw the creditor, when he demands payment, first upon the goods of the principal debtor. This privilege, however, is in general expressly renounced by the surety in the deed itself, and it is also held to be tacitly renounced when he constitutes himself surety as principal [V. d. L. 1. 14. 10; Grot. Tr. Herb. 297, n.].

This privilege was originally introduced by a law of Justinian. If the principal is out of the country, a reasonable time must be given to the surety to obtain the appearance of the principal in court. If after the excussion of the principal a balance still remained due to the creditor, he might recover the same from the surety [Grot. 3. 2. 27]. **Where principal is out of the country.**

It is only when a surety demands, and opposes the exception of, discussion that the creditor is obliged to discuss the principal debtor before he proceeds further against the surety. So, although the creditor has not discussed the principal debtor, his demand and his pursuit against the surety are regular, until the surety opposes the exception of discussion [Poth. 2. 6. 2. 3]. **Surety must demand excussion.**

The surety cannot demand discussion which is likely to be either too long or too difficult. So, the creditor cannot be obliged to the discussion of the property of the debtor which is out of the kingdom, or is in litigation. **Excussion of debtor's property should not be long or difficult.**

When several debtors have contracted an obligation *in solido*, and a third person has engaged as surety for one of them, the surety can, according to Pothier, oblige **Surety may demand excussion of all debtors *in solido*.**

the creditor to discuss not only that debtor for whom he is surety, but likewise all the other principal debtors [Poth. 2. 6. 2. 4].

Discussion is at risk of surety.

The discussion is made at the risk of the surety who demands it, and the creditor may demand that the surety do furnish him with money for the purpose [Poth. 2. 6. 2. 5].

Delay on part of creditor to proceed against debtor.

Mere delay on the part of the creditor to proceed against the principal debtor in consequence whereof the debt becomes irrecoverable by reason, for instance, of the insolvency in the meanwhile of the principal debtor, does not discharge the surety, unless the delay was manifestly unreasonable [Poth. 2. 6. 2. 6].

Rights of surety to compel excussion of principal debtor's property.

A surety may compel the creditor to discuss the principal debtor's property mortgaged to the creditor, even when the creditor has purchased it for valuable consideration [3 Lor. 254]. Writ of execution may go against the surety, but he can protect his own property from actual sale by pointing out property of the principal, and by taking on himself the expense and risk of the seizure of such property [Vand. D. C. 8].

The above, of course, applies to sureties who have renounced the *beneficium ordinis*. If any one has made himself surety just as a principal debtor, and with renunciation of the *beneficium ordinis et excussionis*, says Van Leeuwen, he may be proceeded against before steps are taken against the principal debtor; but he can, if execution is taken out, point out the property of the principal debtor, if there be any such property [V. L. 4. 4. 1].

Where mortgagee permits sale of property mortgaged.

Where a mortgagee permits the debtor to sell the property mortgaged subject to the mortgage, the surety is not discharged thereby [Vand. D. C. 20].

Person becoming surety as co-principal debtor.

A person becoming surety as co-principal debtor can be sued before the principal himself is excussed [Grot. Tr. Maas. 320, n.].

When the *beneficia* cease according to Van Leeuwen.

The *beneficium ordinis sive excussionis*, says Van Leeuwen, ceases (1) if the debtor is absent; (2) if a person has become security for one who is under a natural obligation only, as, for instance, for a ward, a woman, and one who cannot be excussed in his own person; (3) if a surety has fraudulently denied that he had become security; and (4) if the privilege has been renounced [*Cens. For.* 1. 4. 17. 18]. And in almost the same way the *beneficium divisionis*, to be noticed hereafter, ceases—(1) If the other sureties are absent, or at the time of bringing the action are insolvent. If after the commencement of the action they cease to be solvent, the loss falls on the creditor. (2) If a person becomes surety along with a woman, he is bound *in solidum*. (3) If a man has fraudulently denied that he ever agreed to become surety. (4) If a person has renounced this benefit [*Ibid.*].

General renunciation of the privileges insufficient.

Van Leeuwen thinks that a general renunciation of these privileges, in the form, for instance, "renouncing the *beneficium ordinis, divisionis, et excussionis*," is not sufficient, but that they must be expressly and specifically given up; and that even renunciations expressly and specifically made do not hold good, unless the surety had been informed of the privileges, and had them explained to him. The omission to give the information, he says, vitiates the renunciation [*Cens.For.* 1.4. 17. 20].

Guarantor or surety to "indemnify."

In the case of a guarantor or surety to "indemnify," that is to say, to secure the loss or damage which another may suffer through the inability of the debtor to pay, or the depreciated value of the thing pledged, it makes no difference whether he renounces the *beneficium ordinis* or not; for he is not bound further or otherwise than for the deficiency and the loss which the creditor may have suffered, so that recourse to him does not begin until after the complete excussion of the principal debtor or the thing pledged [V. L. 4. 4. 11.; *Cens. For.* 1. 4. 17. 23].

Beneficium divisionis.

(2) The privilege of division [*beneficium divisionis*] whereby, when several persons are security for the same debt, each of them may, when sued for the whole amount, require the creditor to divide his claim, and bring his action also against the other co-sureties, each for his portion *pro ratâ,* in so far as the others are not insolvent. This privilege also may be renounced in the act of security [V. d. L. 1. 14. 10].

This privilege does not hold where several persons have bound themselves as sureties for a guardian in security of his wards, nor when a surety has judicially denied that he is surety. If one or more of the sureties are at the commencement of the action clearly unable to pay, the debt will fall to the lot of the other sureties, but if he or they become unable afterwards, the loss will fall upon the creditor. This of course will happen where the benefit of division has not been renounced [Grot. 3. 3. 28].

The above privileges do not hold in favour of those who neglect to avail themselves thereof judicially. Those who bind themselves each for the whole or each individually are considered as having renounced their rights [Grot. 3. 3. 29].

A man who has become co-surety with a woman who has not renounced the *Senatus consultum velleianum* can be sued for the whole debt, although he had not distinctly renounced the *beneficium divisionis* [Grot. Tr. Maas. p. 320, n.].

Beneficium cedendarum actionem.

(3) The privilege, on payment to the creditor of the principal debt, to demand from him cession of action, not only against the principal debtor, but also against all other persons who are liable [*beneficium cedendarum actionem*]. After the surety has paid, in case he has obtained cession of action from the creditor, he may proceed against the debtor the same as the original creditor. If he neglects to take this cession of action, he has nevertheless at law the right to proceed in his

Where surety neglects to take cession of action.

own name against the principal debtor to recover back what he has paid on his account. He has also the right, when there are co-sureties, to proceed against them to recover *pro ratâ* their proportion of the whole debt paid by him [V. d. L. 1. 14. 10].

Surety must claim cession within reasonable time.

A surety, on paying the debt, becomes entitled also to a cession of the benefit of any mortgage that the creditor has. Payment by a surety, to entitle him to a cession of action, must be made conditional on such cession, or he must claim cession within a reasonable time [*Hendrick v. Frederick*, Wendt 7. See also Appendix, p. 34].

Can cession be claimed after payment by surety?

Cession of action is not absolutely necessary to entitle a surety who has paid for the principal to claim back from the latter what he has paid together with all costs and damage sustained [V. L. 4. 4. 13]. But, according to Van Leeuwen, a surety cannot proceed against his co-sureties without first obtaining from the creditor, by cession, the right which the creditor had against the co-sureties. This cession, according to Grotius, must take place before payment by the surety [Grot. 3. 3. 31] because, it is argued, if payment has been made and the debt, as it were, satisfied thereby, no cession can subsequently take place. Payment here is, perhaps, to be understood as payment in the name of the debtor [V. L. Kot. Tr. Vol. II., p. 47, n.]. Where a surety acts in his capacity as such, cession of action must be claimed after payment, for a surety acquires no right to recoupment until after he has actually paid [V. L. 4. 4. 15].

Circumstances in which a surety has a right of action against the debtor for what he has been obliged to pay the creditor.

In order that a payment made by a surety may give him a right of action against the principal debtor it is necessary that the surety should not have neglected to avail himself of any legitimate objection that the debtor had to the enforcement of his claim by the creditor. Where, for instance, A has become surety for the price of an estate purchased by B, and, knowing that B has been evicted from the estate, A pays the price to the

seller, he will have no recourse against B. If, however, A was ignorant of the eviction, and consequently of the exception resulting from it, B would be obliged to restore to him what he has paid, and he would have his recourse against the seller. Where a surety pays in ignorance of the law, he has no right of recourse against the principal debtor. Where the creditor's defence is one that could not in honour be interposed, the surety is not bound to plead it, but before payment he ought to give the creditor an opportunity of interposing such defence if so advised [Poth. 2. 6. 7. 1. 3].

To entitle a surety to recourse against the principal debtor it is further necessary that the payment made by the surety should be valid, and should have liberated the principal debtor. It is also necessary that the principal debtor should not have paid a second time through the fault of the surety in not apprising the debtor of the payment. The surety might here recover from the creditor what he has received a second time [Poth. 2. 6. 7. 1. 3].

In what circumstances a surety may have recourse to principal before payment by himself.

A surety has his recourse against the principal, but may not enforce it before he has himself paid, unless the agreement provided otherwise, or unless a judgment has been obtained against him, or unless he has remained bound by the suretyship for a very long time, or unless the principal is wasting his estate [Grot. 3. 3. 30], or unless the principal debtor is in failing circumstances, or, in the language of Scotch law, *vergens ad inopiam*, or unless the principal debtor has undertaken to procure the surety his discharge within a certain time, and that time has elapsed [Mor. Eng. and R.-D. Law, 99].

Rights of surety who has paid debt.

A surety having paid releases the principal and the other sureties, and has then his recourse against the principal not only for what he has paid, but also for all costs and losses incurred. He may also before payment, but not after, demand from the creditor cession of the right which he has against the co-sureties (*beneficium*

cedendarum actionem) in order that he may recover from them their share of the debt, which he would otherwise not be able to do [Grot. 3. 3. 31].

Right to contribution.

Where sureties are bound on behalf of the same principal for the same debt and under similar engagements [whether by the same instrument or by different instruments], a right to contribution arises between them, as the result of equity and for equalising the burden. And where they are expressly bound as sureties in the same instrument, the right to contribution becomes an essential part of the contract [*Dering v. Earl of Winchelsea*, 1 Cox 318 ; *Ellesmere Brewery Co. v. Cooper* (1896) 1 Q. B. 75 ; 21 C. R. C. 617].

Sureties for debt secured by mortgage.

Persons who have become security for a debt for which a pledge or mortgage has been given may not be sued before the mortgaged property has been excussed, but only after such excussion for any balance that may remain due to the creditor, even though the mortgaged property be in the hands of a third party, unless it were expressly otherwise agreed upon [Grot. 3.3. 32 ; V. d. K. 507].

Sureties in legal proceedings.

Sureties bound in the course of a legal proceeding for satisfaction of a judgment or order are not entitled to the benefits that sureties generally are entitled to, and on judgment they are liable to execution without a new suit on such judgment, and the surety who satisfies a judgment has recourse against the principal debtor by execution on the same judgment without a fresh action [Voet 2. 7. 17].

SECTION II.

OBLIGATIONS RESULTING FROM QUASI CONTRACTS.

THESE obligations are classified under five heads by Van der Linden—

Unauthorised management.

(1) Unauthorised Management. This consists in the undertaking of the business or concerns of another without his order or knowledge, provided it be not against his will or positive order. The affairs may be such as concern the person directly or indirectly. The affairs of a minor, for instance, concern his guardian [Grot. 3. 27. 1, 2 ; V. d. L. 1. 15. 15].

The person whose affairs are managed must be absent, for a person who is present, and allows another to manage his affairs is considered as giving a mandate. The person whose affairs are being managed is entitled to call upon the administrator for an account of everything the latter has acquired in connection with the administration, together with the fruits and profits, and also to claim compensation for all losses occasioned not only through bad faith but also through negligence. In this particular an administrator is more strictly bound than a mandatory, for the reason that the administrator acts unsolicited, and must therefore exercise greater caution; but he is not liable for accident [Grot. 3. 27. 3 ; V. d. L. 1. 15. 15].

Negotiorum gestor.

A "manager of affairs" [*negotiorum gestor*], says Voet, is one who, without mandate, carries on the business of one who is absent, or who is not aware of the fact of his business being so carried on. The business affairs of one conceived but not yet born, of one captured in war, or insane, or an infant may thus be carried on. A person may become liable as *negotiorum*

gestor in respect of the affairs of one who is dead, and whose estate is lying vacant [Voet 3. 5. 1]. A *negotiorum gestor* is liable for his management, and is entitled to expenses [*Ibid.*].

May be sued for account.

He may be sued for an account of his administration and payment of monies due with interest [Voet 3. 5. 2].

The typical case of a *negotiorum gestio* is that of a person taking upon himself to look after another's affairs in his absence on a journey. There is no reason, however, why the principle should not apply when the *quasi* principal is in any way incapacitated from looking after his affairs, *e.g.*, by illness. The *negotiorum gestor* is entitled to indemnity from the person for whom he has acted for payments he has made, or expenses he has incurred on his behalf [Mor. Eng. and R.-D. Law, 209]. He is not liable for fortuitous accident, nor for monies invested, except where negligence can be brought home to him. Profits made by his ventures are, however, often allowed to be set-off against losses [Voet 3. 5. 5]; but even when his management has been prohibited by the owner of the property managed, he is entitled to reasonable expenses to the extent of the benefit that has accrued to the owner [Voet 3. 5. 11].

Not liable for accident.

Degree of diligence necessary in a *negotiorum gestor*.

The *negotiorum gestor* in Dutch law had to display the highest degree of diligence, that of a *bonus paterfamilias*, which corresponds to the ordinary diligence of English law. But according to Voet [3. 5. 4] there are cases in which he is liable for nothing beyond fraud and gross negligence; for instance, if he has taken on himself to look after the already neglected affairs of a friend which would otherwise be left to their fate. Voet and Van Leeuwen [*Cens. For.* 1. 4. 1. 4, 26, 3] seem, however, to incline to the view that the degree of diligence required is to be judged in each case by the circumstances [Mor. Eng. and R.-D. Law, 210].

The administrator may give up the administration, whenever the business is completed, or whenever he can do so without injury to the other [Grot. 3. 27. 4].

The administrator is entitled to be released by the person whose affairs he has managed from all liabilities incurred with third parties on account thereof, and also to compensation for all losses sustained and expenses incurred, that is to say, if the affair turns out successful or at least was so managed that, according to the judgment of men of understanding, success might have been anticipated [Grot. 3. 27. 6 ; V. d. L. 1. 15. 15].

Services in saving property at sea.

Under unauthorised management may be included services rendered in saving the property of others at sea [Grot. 2. 27. 6].

(2) The administration of guardianship ; for although as between the guardian and his ward there is not, properly speaking, any contract, yet they are reciprocally bound to each other—the guardian to give an account to the ward, and the ward to reimburse the guardian all his costs, charges, and expenses [V. d. L. 1. 15. 15].

Action of co-heirs and co-proprietors for partition.

(3) Community without contract. Thus co-heirs have an action against each other for partition of an undivided inheritance. So also co-proprietors of one and the same thing have an action to divide it and for an account of the profits and disbursements [V. d. L. 1. 15. 15]. As to this action see p. 208 *ante*.

(4) The accepting or entering upon an inheritance. This gives to the legatees and *cestuis que trust* a right of action for the legacies and trust property left by the will or codicil [V. d. L. 1. 15. 15].

Payment of a sum found afterwards not to be due.

(5) The payment of a sum of money found afterwards not to be due. This payment may be recovered, provided there existed no obligation, not even a natural one, to make it, and provided also it had been made by mistake and in ignorance [V. d. L. 1. 15. 15].

The right to recover money paid under a mistake is in Dutch law included under *quasi* contracts. Both English and Dutch law recognise the right of a person who has paid money under a mistake of *fact*, when there is no liability, to recover such money. As regards money paid under a mistake of *law*, the English rule is that such money is not recoverable, although some special equity in the case may justify a departure from the rule. In Dutch law there is a conflict of opinion. Grotius [3. 30. 6], Van Leeuwen [*Cens. For.* 1. 4. 14. 3], Van der Keessel [Th. 796], and others give it as their opinion that money paid under a mistake of law can be recovered. Other writers, such as Voet [12. 6. 7 and 22. 6. 5], hold the opposite view. The tendency in South Africa seems to be to hold that money paid under a mistake of law cannot be recovered, unless there are special circumstances in the case. The point was fully argued in the Transvaal in the case of *Rooth v. The State* [Kot. & Bar. 259]; and it was held that, in the circumstances of that case, the money paid under a mistake of law could not be recovered [Mor. Eng. and R.-D. Law, 212].

SECTION III.

Obligations resulting from Crimes.

Crime and obligations arising therefrom.

Crime is the voluntary committing or omitting anything contrary to law, and therefore punishable under it. Out of crime arise two kinds of obligation, the one, to suffer the punishment prescribed by law for the act, which is of a public nature, and the other, to make good the damage occasioned by the criminal act. This gives rise to a civil action [V. d. L. 1. 16. 1].

Ceylon Penal Code.

Ordinance No. 2 of 1883 provides a General Penal Code for the colony, and every person is liable to punishment under it and not otherwise for every act or omission contrary to the provisions thereof of which he may be guilty within the colony [sect. 2]. Ordinance No. 15 of 1898 consolidates and amends the law relating to the procedure in the courts of criminal judicature in the Island. The right of prosecution for murder or treason is not barred by any length of time, but the right of prosecution for any other crime or offence, save and except those as to which special provision is made by law, is barred by the lapse of twenty years from the time of the commission thereof [sect. 444].

The Criminal Procedure Code.

Prescription of crimes and offences.

Damages may be recovered for a crime without the institution of criminal proceedings.

Under the Roman-Dutch law one may proceed civilly against a man who has wronged him without first prosecuting him criminally for the offence. A man who is aggrieved may not condone or compound a crime, but he may seek redress in a civil action at once [*Per* Barry, J., in *Schoeman v. Goosen*, 3 E. D. C. 7. See Mor. Eng. and R.-D. Law, 216].

Liability of heirs of wrongdoer.

Obligations arising out of delict do not bind the heirs of the wrongdoer, but they are bound to make restitution of benefits enjoyed [Grot. 3. 30. 3]. Under the

English law also actions for a mere tort, such as assault, &c., die with the wrongdoer, and cannot be maintained against his representatives. But where, besides the commission of the wrong, property is acquired which benefits the testator, there, an action for the value of the property survives against the executors [*Hambly v. Troft*, 1 Cowper, 371; 2 C.R. C. 1].

The heirs of a criminal are liable to make reparation to the injured person in so far as it is in their power to do so, unless the action has already been commenced against the deceased. The heirs of a person injured by the crime of another are entitled to reparation, if the crime injuriously affected heritable property, but not life or honour [Grot. 3. 32. 10].

Right of heirs of person injured.

Death of a party does not extinguish the civil action for damages.

The weight of authority supports the proposition that the death of a party does not extinguish the civil action for a tort. Such actions, like contractual rights, belong to or can proceed against the estate of the deceased [Voet 47. 1. 3]. There are only two exceptions to this rule, viz., in regard to actions for *injuria* and to actions for homicide. As regards the first, the word *injuria* is used in a narrower sense than injury in Englsh law. *Injuria* were wrongs to the honour of a person, and include those wrongs in which there was an element of insult [*contumelia*]. They include such torts as malicious arrest, defamation, seduction. In such cases, the death of either party extinguishes the right of action except when it has taken place *post litem contestatam*, *i.e.*, after the close of the pleadings [Voet 47. 10. 22]. The other species of tort affected by the death of a party is homicide, intentional or otherwise. It is laid down by the Dutch authorities that the heirs, *i.e.*, the estate of a person who has been killed, are not entitled to damages from the wrongdoer, except as regards the funeral costs and other special expenses. The reason given by Grotius is that life, like reputation,

is not hereditary; while Van Leeuwen takes the Roman view that the life of a person cannot be estimated in money. But while the heirs had no action for damages, an action for compensation accrued to the wife, children, and other relations of the deceased who had been supported by his labour. The action was for damages to the living relatives, not to the deceased's estate [Voet 9. 2. 11; Grot. 3. 33. 2; V. L. 4. 34. 16; V. d. L. 1. 16. 2]. The Dutch law as regards damages for death thus closely resembles the English law as changed by Lord Campbell's Act [Mor. Eng. and R.-D. Law, 222].

One who injures another by crime is liable to make adequate reparation, even though he has not done the deed himself, but has by act or omission in some way or other caused the deed or its consequences [Grot. 3. 32. 12, 13, 14].

Wrongdoers liable *in solidum.*

Wrongdoers as above are liable to make compensation each *in solidum.* When one pays, the others are released. Reparations must be made as soon as possible, and as far as possible [Grot. 3. 32. 15, 16; Voet 9. 2. 12].

Tort feasors may be sued severally.

Any one of several joint tort feasors may be sued for the whole damage sustained by their joint act. Under the English law also, where the ground of action is a pure tort, the defendant cannot set up, either by plea in abatement or otherwise, that others were joint wrongdoers [*Mitchell v. Tarbutt*, 5 T. R. 649; 1 C. R. C. 183].

Where several persons inhabit an upper storey together [*pro indiviso*] from which something has been thrown or poured down, each occupier can be sued for the whole damage *in solidum.* If one person inflicts a wound on an animal that will certainly cause death, and another subsequently kills it outright, both will be liable for the death [Voet 9. 2. 8 *et seq.*]. The Aquilian action for injury was, in Holland, allowed against the

heirs of the offender, and payment by one of several joint wrongdoers of the damage claimed released the others [Voet 9. 2. 12].

All persons who have the use of their reason and consequently even minors, provided they have passed the age of childhood, are liable to make reparation for crime [Grot. 3. 32. 19]. Liability of minors for crime.

Whoever harbours, lodges, or assists a criminal after receiving legal notice from the party injured is liable to make good the damage to the party injured [Grot. 3. 32. 21]. Liability of those who harbour criminals.

SUB-SECTION I.

Injury to Life, Person, and Property.

Crimes against life, &c.

A person causing the death of another is not, as observed already, liable to the heirs, except for funeral expenses and any other expenses which may have been caused by the crime. To the widow, children, and others, however, if any there be, who derived their maintenance from the labour of the deceased he is liable for compensation in damages and for loss of profits to be estimated on the principle of annuities [Grot. 3. 33. 2].

Accomplices and accessories.

An action is given to these against all those who have been accomplices in the murder or accessories, although it cannot be satisfactorily ascertained which of them has given the deadly stroke [V. d. L. 1. 16. 2]. But in cases of homicide committed in self-defence or from a cause entirely innocent this action does not lie [*Ibid.*].

Recovery of damage by husband for assault on wife.

In the case of *Carolis v. Bastian* [2 S. C. C. 184], which was an action for damages arising out of an assault upon the plaintiff's wife who had died before action, it was held that the plaintiff was entitled to sue for damages for the loss of the services of his wife and for medical expenses incurred on her in consequence of the assault, but not for injuries to the wife, as the right of action in respect of personal injuries died with the wife, and did not survive to the husband upon the principle *actio personalis moritur cum persona.*

Valuation of loss from injury from crime.

Crimes to the person give rise to the obligation to pay the surgeon's bill and damages and loss of profits both during the illness and afterwards, if the injury is permanent. The pain and disfigurement of the body, although not really capable of compensation, have a money value put upon them, if such is demanded

[Grot. 3. 34. 2; V. d. L. 1. 16. 3]. If a person is wounded in a riot, he has his action against all the parties engaged therein. But wounds inflicted in self-defence or by mere mischance cannot be the subject of any action [V. d. L. 1. 16. 3].

Persons wounded in a riot.

Parents are entitled to compensation for hurts to their minor children. Male and female servants may themselves claim compensation, but so also may their masters and mistresses in so far as they are injured by the loss of their services. Husbands have a right of action for injury done to their wives [Grot. 3. 34. 3; 3. 35. 6].

Rights of parents, masters, husbands, &c.

Masters and mistresses are not as a general rule liable for the crimes of their servants beyond the amount of their unpaid wages. But masters of ships, innkeepers, and stable keepers are bound to make good all damage which any one who has person or property on board the ship or in the inn or stable may suffer through the acts of the crew, servants, or stable boys [Grot. 3. 38. 8, 9].

Liability of master for crimes of servants.

The general rule of English law is that a person is answerable for the wrongs committed by his agents or servants acting within the scope of their employment. This does not preclude the personal liability of such agents or servants in cases of tort. The Dutch writers are not unanimous on the point [Mor. Eng. and R.-D. Law, 216]. In the case of *Lewis v. The Salisbury Gold Mining Co.* [Off. Rep., Tr., 1, p. 7] Kotze, C.J., summed up their views as follows—"Grotius in his Introduction [3. 34] says that a master is not bound by the act of his domestic servants, except where such has been expressly provided by statute; and in Ch. 38, sect. 8, he adds that a master is only liable in general for the wrongs of his servant to the extent of the latter's unpaid wages. Van der Keessel [Th. 478] in his commentary on this passage observes that masters who have not benefited thereby are not as a rule bound by the delicts of their domestic or hired servants committed

Summary of Dutch authorities on the subject.

in the discharge of their duty. They are, however, liable where, in a work requiring skill, the servants have shown themselves unskilful. It seems to me that the rule is somewhat obscurely and too narrowly stated here, and Chief Justice Schorer [*ad* Grot. 3. 34] has approached nearer the truth when he says, 'Grotius rightly remarks that masters are not liable for the acts of their servants to a greater extent than their wages. But the masters will be liable for the whole, when they have expressly entrusted some service to their management, and the servants have through their negligence caused any damage. And this is by no means unjust, because they could have selected more careful servants. Likewise by the Placaat of the States of Holland keepers of the downs are liable for their servants, if they have laid poison in the downs, or have killed dogs of any one entitled to a free right of the chase. In a similar way, bleachers are liable for the acts of their children and servants, whenever the latter do anything contrary to the laws with respect to bleaching [Voet 9. 4]. But this in my opinion must be taken to refer to the negligent or careless act of the servant, inasmuch as the master could have employed more careful servants, but not if the act is wilful, in which case the master is not liable to make compensation, but can escape by leaving the servant to undergo the punishment, for every one must suffer for his own wrong.' * * * Van Leeuwen in his Commentaries [4. 39. 2], Voet [9. 4. 10], Pothier [Obligat. sects. 121, 456], and other writers likewise lay down the general principle of a master's responsibility for the negligence of his servants acting within the scope of their employment."

But whatever diversity of opinion there may be among Dutch writers, probably owing to the influence of English legal ideas, the principle of liability for the torts of one's agent or servant, acting within the scope

of his employment, is fully established in South Africa [Mor. Eng. and R.-D. Law, 218].

Liability of master for injury done by servant to fellow servant.

In Dutch law there is no authority on the question whether or not a master is liable to his servant for damage done to him through negligence of a fellow-servant engaged in the same service. In the Transvaal case of *Lewis v. The Salisbury Gold Mining Co.* [Off. Rep., Tr., 1, p. 7] the judge in the first instance followed the English and American decisions on the subject. The Court in appeal, however, reversed this decision, holding that there was no reason why an exception should be made to the general rule that a master is liable for wrongs done by his servant within the scope of his employment [Mor. Eng. and R.-D. Law. 220].

Several liability.

When several persons have acted together by land or sea, and it is uncertain on account of the darkness or otherwise who has inflicted the wound, they all constitute together one guilty person, or one may be sued *in solidum* [Grot. 3. 34. 6].

Criminal responsibility of master for act of servants.

A master is not criminally reponsible for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master [*Herft v. Northway*, 9 S. C. C. 142; 1 C. L. R. 27]; but as stated already, civil responsibility of the master depends upon the question whether the servant acted within the scope of his employment. In the case of *Malhami v. Conductor* [4 S. C. C. 136] the evidence established that the first defendant had control over a coffee estate and over second defendant who was employed under him, that first defendant gave second defendant instructions to shoot trespassing cattle, provided that he could not catch them, and that second defendant thereafter shot plaintiff's buffalo needlessly; and it was held that plaintiff was entitled to recover from the first defendant, the act complained of having been done by him within

Civil liability.

the general scope of his employment, although in breach of his duty towards the first defendant.

Liability for injury by animal.

Whoever sets on an animal so that it inflicts injury on any one is liable [Grot. 3. 34. 7].

Right of heirs to compensation.

Where injury is done to a man's freedom, the right to compensation does not pass to the heirs of the injured party except after action commenced, but the children of the injured person or others who have an interest therein may nevertheless sue for compensation [Grot. 3. 35. 4].

Heirs of offender liable after judgment.

The heir to the injuring party is not liable for the injury except after judgment delivered [Grot. 3. 35. 5]. A penal action for injury cannot be commenced against an heir; but if penalties have once been decreed against the deceased, nothing prevents their being thereafter continued against the heirs [Voet 2. 2. 1].

Seducer of young woman.

The seducer of a young virgin must marry her, or make compensation in money for the seduction in accordance with the circumstances of both parties, and in case she is with child, he must pay the lying-in expenses. Children born out of wedlock must be maintained at the joint expense of the father and mother, if both have the means and ability to do so; otherwise one is liable for the whole [Grot. 3. 35. 8].

Action for seduction.

In Dutch law a woman has an action for seduction, provided she was a *virgo intacta* previous to the seduction. According to Van der Linden [1. 16. 4.] the seducer could be ordered to marry the woman or pay damages; and the choice was left to him, provided a breach of promise of marriage could not be proved, in which case he could be compelled to marry. In the case, however, of *Hart v. Yates* [3 Off. Rep. Trans. 282] where the seducer declared himself ready to marry, but unable to make a satisfactory marriage settlement, the court awarded Rs. 5,000 damages, without the alternative of marrying. In ordinary circumstances the court would

probably allow marriage as an alternative, if there were no objection to it. It may be pointed out that by local law of the Transvaal [Law No. 3 of 1871] no one can be compelled to marry by judicial sentence. Besides the damages for seduction, the person seduced was entitled to costs of confinement, and in case of the death of the child the costs of its burial; also to a reasonable aliment for the child. [In England a woman can obtain aliment for a child by the statutory action for an affiliation order.] The costs could be obtained by any woman who was seduced, whether or not she was a *virgo intacta*. In actions for seduction or for costs and aliment, it was a rule of evidence that the man's oath was preferable to the woman's; so that if the man denied the connection, the woman had to bring corroborative evidence [Mor. Eng. and R.-D. Law 232].

Action for loss of services by seduction.

In Dutch law it does not appear that the parent would have an action for loss of services by seduction. There is a class of actions in English law *per quod servitium amisit* under which a parent can sue in his own name for injury done to a child living under his care and control, provided the child was old enough to be capable of rendering service. Enticing servants from their master's service, which is actionable in English law, [whether introduced by common law or statute is doubtful] is of this nature. Such wrongs do not seem to be known to Dutch law. But by the legislation on masters and servants in South Africa enticing away servants is made a punishable offence, and therefore presumably a civil wrong [*Ibid.* 233].

Liability of adulterer.

A person who commits adultery with a married woman, even though with her consent, inflicts an injury on the husband, and is consequently liable for the same to the husband over and above any damage which the husband or children may suffer thereby [Grot. 3. 35. 9].

Who may sue for damage caused by crime of property.

For damage caused in consequence of crime in respect of property not only the owner in full or qualified ownership, but also he who has the use of or a mortgage upon or merely the possession of the property has a claim against the wrongdoer in so far as he is injured by him [Grot. 3. 37. 5].

Measure of damage in case of release of one arrested for debt.

The penalty for the unlawful release of one under arrest for debt would appear to be the real value of the thing in litigation, even if it be shown that the person released was in fact not indebted [see Voet 2. 7. 1].

Liability *in solidum.*

If the release be effected by many, each is liable *in solidum* [see Voet 2. 7. 2].

SUB-SECTION II.

INJURY TO REPUTATION, FEELINGS, &C. [DEFAMATION].

IN this sub-section we intend treating on all such injuries as are dealt with by Voet in his title "*De Injuriis et famosis libellis*." This heading has apparently been mistranslated in certain translations of portions of Voet's Commentary. In one, it is given as "Injury *or* Libel," as if the whole title dealt with that particular species of injury known as Libel. In another translation, Voet is made to say—"In this book *injuria* is used in the sense of defamation." The words in the original are, "*Sed hoc loco injuria accipitur pro contumelia, sic ut nonnullis definiatur, quod sit contumelia contra bonos mores alicui illata; licet rectius dicendum videatur quod sit delictum in contemtum hominis liberi admissum, quo ejus corpus, vel dignitas, vel fama læditur dolo malo.*" There would appear to be no authority for limiting the meaning of "*contumelia*" to defamation, if at all it admits of that meaning. In a sentence lower down in the text, in which the word is repeated, it is given the meanings, "offence" and "outrage" in the translations referred to above. Voet in his title treats of "Injuries *and* Defamatory *libelli*.*" Injury is used in the sense of an outrage on good morals—an "offence in

Scope of Voet's title headed "*De injuriis et famosis libellis.*"

Meaning of *Injuria.*

* The Latin word *libellus* by itself is not the equivalent of the English "libel." "Libel" means a defamatory writing. Originally it meant a writing consisting of several leaves, a book. It seems to have derived its bad sense from the Latin phrase "*libellus famosus*," a defamatory book or pamphlet, with which, the epithet being omitted, it came to be identical in signification, being generally understood to imply defamation [Webster]. "*Libellus*" by itself means a little book, pamphlet, journal or diary, petition, notice, placard.

"Libel" and "*Famosus Libellus*."

contempt of a free man by which his person, rank, or reputation is, in bad faith injured." *Injuria* has a very much wider signification than defamation. It includes defamation. At the same time, it embraces nearly every conceivable act [see, for examples, Voet 47. 10. 7, *infra*] committed with evil intent, resulting in insult, disgrace, ignominy or the like [*contumelia*]. It is derived from the word *jus* [right], and implies a negation of that which is denoted by this word. "In its most usual sense, when standing by itself, it expresses an unlawful, vexatious, and intentional act of one person whereby another is assailed in respect of his absolute rights of personality." It is in this sense that the term is used in Voet's title referred to above [M. de Vil. 22].

We shall here give the substance of the different sections or paragraphs of Voet's title in order, with such annotations and citations from other authorities as we may deem necessary.

"Injury defined.

1. Injury used in the sense of reproach may be defined as an act of insult against a man by which either his person, his honour, or his good name is defamed. Injury can be committed by those only who are capable of great deceit, the condition of the mind being taken into consideration as in other offences. Brute animals, says Voet, are not capable of committing it. A youth approaching manhood, although under tutelage, may be guilty of injury as well as of theft, but not children or youths of tender age, nor insane or imbecile persons, nor those in a state of sleep or unconsciousness. Persons in a state of inebriety are not altogether innocent of what they do in that state. If knowing that they cannot withstand impulses aroused by intoxication, they indulge in intoxicating liquor, they are not to be excused. But when one, in a state of intoxication, utters reproachful or defamatory speech, the proper course would be to inquire of him, when he is sober, whether he is

Who can commit injury.

Injury by person in state of inebr.ety.

willing to withdraw the remarks made by him. The same may be said of one who uses injurious words in the heat of anger or sudden passion. In either case, if the offender expresses his regret, and promises to withdraw the words used, he should be excused; but he should be held liable to the party injured, where he appears to persevere in his offence [Voet 47. 10. 1].

In the heat of anger.

An action of injury [*actio injuriarum*], says Van der Linden, whereby are understood, as laying the grounds for this action, all acts or words intended to injure a person's honour, lies against the offender. These injuries are divided into those occasioned by acts and those by words spoken or written. The party injured has an action not only for compensation in pecuniary damages, but also for reparation of honour, which double claim is termed *amende honorable et profitable*—*honorable*, by causing the opposite party to ask pardon in court for the injury he has done to the other with the declaration that he is sorry for what has happened, and that he holds the plaintiff for a man of honour, against whose character he has nothing to say; and *profitable*, by the payment of a certain sum to the poor [V. d. L. 1. 16. 4].

Action of injury as defined by Van der Linden and remedy.

The more stringent laws of Holland against defamation had reference to injuries against public persons or to those acts by which civil discords were recalled to memory. Hence, the punishment of slander against private individuals on other matters was not fixed, but discretionary with the judge [V. d. K. 802].

Punishment of slander when discretionary.

Defamation was defined in the case of *Jayewardene v. Aberan* [Ram. 1863–1868, 126] to be the malicious publication by word of mouth, by writing, by printing, or by pictorial or other representation, either in the presence or the absence of a person, publicly or secretly, anything whereby his honour or good name is injured or damaged. This definition includes all the elements of slander and libel under the English law.

Defamation.

Defamation in English law.

In English law defamation consists in the publication of words spoken or written which injure the reputation of any one. When the words are spoken, it is slander; when they are in writing or printed, it is libel. It is necessary that the defamatory words should be in some way made public, *i.e.*, communicated to a third person. In Dutch law there is a conflict of opinion as to whether publication is necessary to constitute defamation. The conclusion one would draw from the Dutch authorities is that it is not. Most of the Dutch writers do not mention publication; especially Voet who deals with the subject at length in Book 47. A passage in the Hollandsche Consultatien [Vol. V., p. 274] gives the impression that publication was unnecessary. And the definition of defamation as a form of *injuria*, *i.e.*, insult, suggests that it is sufficient if the person's feelings are wounded. On the other hand, Huber expressly states that publication is necessary in *injuria verbalis et literalis*. In Cape Colony there has been no conclusive decision on the subject [Mor. Eng. and R.-D. Law, 234]. As there is some Dutch authority for the necessity of publication, it is perhaps advisable, says Mr. Morice, that in order to secure uniformity with the English law, publication should be regarded as necessary [*Ibid.*].

Slander.

Libel.

Is publication necessary in Dutch law?

Slander in English law actionable *per se* in certain circumstances only.

Slander, in English law, is actionable *per se*, that is without proof of special damage, only in the following cases—If the words used (1) charge the plaintiff with the commission of a crime; (2) impute to him a contagious disorder tending to exclude him from society; (3) are spoken of him in the way of his profession or trade, or disparage him in an office of public trust; (4) impute unchastity or adultery to any woman or girl. In all other cases of slander the fact that the plaintiff's reputation has been injured must be proved by consequences that directly resulted from the utterance, *i.e.*, by special damage. In Dutch law verbal defamation

is like libel in English law actionable *per se*, that is, without proof of special damage [Mor. Eng. and R.-D. Law, 238].

In Dutch law, actionable *per se*.

2. A person can be guilty of injury when engaged even in a lawful act. When engaged in the lawful discharge of the duties of his office, he commits injury every time he contumeliously exceeds his duties, and oversteps the bounds of his authority to the detriment of another. Judges, by virtue of the honour and dignity of their office, may reprimand and punish litigants, and also legal practitioners who appear before them, if they offend in any way; and masters can moderately chastise their pupils, if they will not properly learn their business. But if, contrary to good manners, any one of these has aggravated another by the use of injurious language, if he should inflict chastisement without cause, or to an immoderate extent, not for the public good or with the object of admonishment or for improvement, but for malice and in order to disgrace [although this is not to be lightly presumed] an action for injury will lie [Voet 47. 10. 2].

Injury in course of lawful discharge of duties.

By judges, masters, &c.

A magistrate is not liable in an action of injury for anything said or done by him within the proper limits of his authority in the *bonâ fide* execution of his duty. Therefore no action will lie against him for language which is pertinent to the matter before him in his official capacity and which he honestly believes to be warranted by the facts of the case. It is his right and also his duty to uphold the dignity of his office, and measures which are absolutely necessary to effect that purpose and which are not improper or indecent or opposed to the law will be justified. But if with an intention to injure, he uses language utterly unwarranted by the facts of the case, in abuse of his position as magistrate, and not under the justifying circumstances just stated, he renders himself liable to an action. Where these circumstances do not obviously exist, the

Liability of magistrates.

nature and degree of his excess may afford some evidence of *animus injuriandi* existing on his part; but in the absence of other proof of an injurious intention the law will apparently not scrutinise too closely whether his acts or utterances do not go somewhat beyond the exact limits of what is required in every particular case. The presumption is in favour of a magistrate exercising the duties of his office *bonâ fide;* for, where a duty is imposed upon any person, then in respect of that duty the ordinary presumption that a man is not a wrong-doer, unless it is proved that he is such, holds good. Of course, if a magistrate wilfully acts outside of his province altogether in perpetrating an injury, or commits an unlawful act under cover of his authority, he stands in the same position as any private individual, except that it is an aggravation of his offence, if he has abused his authority. Thus, when he extorts money through threats of punishment, he renders himself liable both civilly and criminally. The same principles that apply to magistrates also apply to other judicial functionaries. In most cases where courts of law are established by law, the law itself provides for the measures to be taken in order to maintain its orderliness of procedure. With regard to individuals properly carrying out their official duties, the general principle applies that they are not liable to actions for doing so. A gaoler putting a person into prison on proper authority is only doing his rightful duty. He is therefore not liable for doing so, but, on the other hand, he may not ill-treat his prisoners. Sheriffs' officers also only render themselves liable when they act in excess of their duty. A constable may in the exercise of his duty arrest a person upon a complaint of theft lodged with him and credible information imparted to him by the person from whom an article has been stolen; but if he arrests a person on the chance that such person may be the one sought for, he exceeds his

Of other judicial functionaries.

Of gaolers, sheriffs' officers, police constables, &c.

duty. Schoolmasters and other persons standing *loco parentis* may administer reasonable personal chastisement on those placed under their charge. But the correction must not exceed the bounds of moderation either in respect of measure or the means of punishment, the nature of the offence for which the pupil is punished being taken into consideration. Any excess may afford some evidence of *animus injuriandi*; but the courts of law will not weigh too nicely the exact degree of punishment inflicted, and the presumption is in favour of the punishment not having been inflicted with an *animus injuriandi.* This *quasi*-judicial authority of masters to punish can be supposed to have reference only to offences committed by the pupil whilst he is or may be considered to be under the schoolmaster's charge, to disobedience to the wilful orders of the master, or to violations of the proper discipline of the school. A schoolmaster may thus expel a boy from his school on an honest belief of serious misconduct. There is practically no difference between a Sunday school and a day school, the principle being that a number of boys cannot be kept together under discipline without corporal punishment. A husband possesses marital power over his wife; but he has no right to beat or otherwise ill-treat her. The terms upon which a matrimonial contract is entered into are not supposed to include the right of inflicting any, even moderate, castigation [M. de Vel. 39–42. See authority therein cited].

Of schoolmasters.

Husband may not ill-treat wife.

A creditor may in execution of a decree in his favour have the goods of his debtor seized and taken in execution; a marshall may take the necessary steps to carry into execution judgments and orders of courts in respect of which mandates are issued to him for levying execution; but if a creditor seize the goods of his debtor in an injurious manner, or a marshall have seized and sold the goods of a debtor who was prepared

Creditor or marshall acting injuriously in taking in execution goods of debtor.

to satisfy the judgment, he is liable for the injury thus caused. So, although a husband may, after a divorce has been obtained, request an examination of his wife, if she denies being pregnant, and he desires to be declared the parent of the child, where a husband does this without reasonable grounds of suspicion, and with intention merely to vex and insult his wife, she may maintain an action for the injury. Similarly, where a husband pretending to exercise his marital power allowed by the law over his wife, abuses that power by the infliction on her of actually disgraceful injuries, she has her remedy, by action, for such injuries; but the complaint must be couched in words temperate and reasonable, and in accordance with the respect due to the marriage state [Voet 47. 10. 2].

Injury by husband to wife.

The head of a family has the power to chastise moderately his dependents, and so has the captain of a ship. He may, during a voyage, moderately chastise the crew in his service. The sailor must endure the punishment, unless the captain repeat blows. However, a sailor who has been slandered by or has received personal injury from the captain may sue him after the termination of the voyage [*Ibid.*].

Power of head of a family and captain of a ship to chastise dependents.

3. It makes no difference whether a person has himself done the injury, or has instigated, ordered, or in any other manner caused the same to be done. The person giving the order and the person executing are equally liable. In the case, however, of a slight injury which a servant or a son would commit at the bidding of his master or father, the person giving the order only is liable. Here the necessity for obedience excuses the son or the servant, and relieves him from action and punishment. The husband, during the subsistence of the marriage, is liable for an injury done by the wife, and is bound to satisfy the judgment so far as it is one for the payment of a sum of money as damages [Voet 47. 10. 3].

Person instigating injury.

Husband liable for injury by wife.

4. Certain persons, such as young children and idiots, may suffer injury involuntarily, if their position is such that they may be injured in their good name and fame, although they themselves may not be able to understand that they have been scandalously treated. Verbal defamation of dissolute and despicable persons, those branded with infamy, and godless and wicked men, and men of no birth or fortune, is not actionable; as it cannot be said that their reputation has been injured when they had none. However, even such a man, if he has been the victim of an injury of a specially atrocious nature, may maintain an action for relief [Voet 47. 10. 4].

Young children and idiots may suffer injury.

Defamation of dissolute persons.

5. Not only the living, but the dead may be vilified and slandered, and real injury done to them, if, for instance, the body is detained, the funeral prevented, the remains thrust out from a place set aside for a perpetual burying place, or the sculpture or other mementoes placed on the tomb are destroyed. In these cases, if the injury is done before adiation of the inheritance, an action for injury accrues to the estate as representing the deceased, and through it to the succeeding heir. If after adiation, then those who are heirs of the deceased or who have obtained possession of his property have the right of action in their own names; and each can bring a separate action for the full amount of damages. Just as much as the *actio violati sepulchri* is competent to a son, although he has repudiated the inheritance, the children of a deceased person to whom injury has been caused have, according to better opinion, the right to sue for damages, although they have repudiated the inheritance. In the case of extraneous heirs [*extranei heredes*] they have a right of action, if the deceased is defamed after they have adiated the inheritance. They bring this action not as heirs representing the estate of the deceased [because the action of injury is not given to or against heirs] but on

The dead may be vilified.

Who may sue in such case.

Action by heirs for injuries to a deceased.

their own account as persons injured by reason of the injury to the deceased [Voet 47. 10. 5].

Person may be injured through another.

6. A person may be injured directly or through another, for instance, through the person who is in his power or who is the object of his regard. So, a master may suffer injury through his servant, a father through his children who are in his power, and who with him are regarded as one person. A husband may be injured through his wife, and a bridegroom through his bride ; although, conversely, where a husband or bridegroom is injured, the wife or bride has no right of action ; nor could a widow maintain an action for injury to her deceased husband committed after his death. But, where matters are injuriously published of a bridegroom or husband, whether alive or dead, that tend to disgrace the bride, wife or widow, these may maintain an action for damages. Injury may also be done to magistrates and judges through their officers, to lords through their vassals, subjects, and ambassadors, as for instance, where injury is done to the officers, vassals, subjects, and ambassadors in contempt of the magistrate, judge, or sovereign whom they represent, and to whom they are subject. A whole family and kindred or brotherhood may likewise be injured by an injury done to one member, so long as the injury affects not a single person, but the rights and honour of the family or kindred or brotherhood as a whole. It must, however, be remembered that in the aforesaid instances, in which one suffers injury through another who is injured, it is necessary that the party injuring should have been aware of the position of the party injured, and should have known that it was to a son, a wife, a bride that he was causing injury, although possibly he was ignorant as to who was really the father, husband, or bridegroom, or he was mistaken as to the identity of the person indirectly injured [Voet 47. 10. 6].

Injury to magistrates, judges, &c., through their officers.

Whole brotherhood or family may be injured by injury to one member.

Party injuring through another must have knowledge of relation between party directly injured and party indirectly injured.

In *Appuhami v. Kirimenika* [1 N. L. R. 83] it was held that a father could not sue for damage for slander of his daughter, although he may have felt pain by such slander, and that proof of special damage was not necessary to sustain an action for slander.

Father cannot sue for slander of daughter. Proof of special damage not necessary to sustain action for slander.

7. Injury is committed in various ways, namely, by deed, words, writings, and by what tends to cause prejudice to one's body, dignity, or reputation. Voet gives the following as being among the more important examples of cases of real injury—where a person is assaulted or struck, or where one's house is invaded by another, whether he lives in it as owner, lessee, or as tenant at will, and wherever the house or habitation may be situate; where one enters the garden of another against the will of the owner; where one, without striking another, keeps lifting his hand against him, and frightens him with the idea that he is about to be struck; where one throws dung or filth on another, or smears him with mud, or pollutes the water of another; where one puts another out of his mind by administering to him some drug or such other thing by, for instance, plying him with too much wine in order thereafter to expose him to ridicule; where one, openly, by a caluminious accusation, causes an innocent man to be subjected to torture, or being a judge, calumniously causes torture to be inflicted; where one seizes and sells the goods of another who is not his debtor, as if they were the goods of his debtor; where one seals the house of his debtor without the authority of him who has the right and power to permit it; where one, with intent to cause annoyance, summons a person before a court, or maliciously and with intent to cause injury, has another arrested or detained in custody; where one would not accept goods and sufficient security or approved security in a case of arrest; where, when a debtor is ready to pay the amount of his debt to the creditor, the latter, in order to injure the

Various ways in which injury may be committed.

Examples of real injury.

Malicious prosecution and malicious arrest.

the debtor, brings up the sureties before the court; where one prevents another from alienating his own property as he likes; where one prevents another from making use of his own or public property or a public way or place, or from fishing in the sea; where one sells to another the result of a case professing that he expected judgment in his favour by reason of his having bribed the judge; where one, maliciously, forbids the banns in order to hinder another's marriage; where one debauches and seduces another's maids; where one assails another's modesty, or by soft words of flattery causes a chaste woman to become immodest; where one abducts the escort of a maiden or married woman; where one accosts in the public streets or molests any woman with improper motives; where one dogs the steps of an elegantly dressed or modest matron, or secretly follows her frequently contrary to good manners, with a licentious intention, and in consequence of this constant assiduity she obtains a bad reputation; where one, to dishonour another, goes into mourning or wears dirty clothes, or suffers his beard to hang or lets his hair grow; and where one paints a picture to ridicule another, or represents another in a ludicrous light on the stage, or makes fun of another by obscene and vulgar gestures, or indicates by gestures that which, if in words or writing, would be defamatory [Voet 47. 10. 7].

Molesting women in public street.

Going into mourning or wearing dirty clothes, &c., to dishonour another.

Picture painted to ridicule another.

Action for seduction.

An action lies for seduction or deflowering of a virgin even with her consent to compel the offender to marry her or to pay compensation for loss of honour in money. To maintain this action she must make oath that she never has had carnal connection with any other man. Therefore, a widow cannot maintain this action. The choice whether to marry the woman or make her compensation in damages lies entirely with the man, provided no previous promise of marriage can be proved against him. He is further liable for the lying-in

charges, and in case of the death of the child for the costs of burial. He is also liable for reasonable allowance for maintenance of the child. When the man is ready to declare upon oath, which he is bound to do in all cases in which he denies the charge, that he has never had carnal connection with the woman, and she is not prepared to show cause why his oath should not be admitted, his oath has the preference [V. d. L. 1. 16. 4].

Against married man.

Against a married man, when the woman knew that he was married, no action lies except for the costs of lying-in and for support of the child [V. d. L. 1. 16. 4].

Malicious prosecution—summary of decisions.

As to legal proceedings maliciously instituted or prosecuted, the following are among the more important judgments.

Suing out writ against person maliciously.

A successful litigant who sues out a writ of execution against a person, and maliciously enforces it without discussing the writ against property is liable in damages to the aggrieved suitor. The absence of reasonable and probable cause is in itself evidence, though not conclusive, of malice [Ram. 1863–1868, 99].

Obtaining search warrant maliciously.

In *Meedin v. Mohideen* [3. N. L. R. 27] the defendant was alleged to have taken out a search warrant to search the plaintiff's house maliciously and on false material, and it was held that the action was an action on the case for injury, and that it was necessary that the plaintiff should prove intent on the part of the defendant to expose him to contumely, and that if the defendant had applied for the warrant hastily and without reasonable cause, such intent was not to be inferred from that fact.

Matters to be proved in action for malicious prosecution.

In actions for malicious prosecution the questions to be considered are—(1) Did the defendant take reasonable care to inform himself of the true state of the case, and (2) Did he himself believe the case which he laid before the Magistrate? Where a defendant surrendered his judgment to that of an inspector of police, and

instituted proceedings without satisfying himself that there was reliable evidence to support the charges made, it was held that there was an absence of reasonable and probable cause [*Orr v. Martin*, 1 S. C. R. 204].

Onus as to reasonable cause.

In an action for malicious prosecution the primary *onus* of showing the absence of reasonable and probable cause on the defendant's part lies on the plaintiff, though slight material may suffice to shift the *onus* [*Silva v. Jayewickreme*, 5 S. C. C. 203].

Where it appears that the defendant had acted on competent legal advice, it is necessary for the plaintiff to show that the defendant had not taken reasonable care to inform himself of the facts, and that he did not act *bonâ fide* upon the advice believing that he had a cause of action [*Ravenga v. Mackintosh*, 2 Barn. & Cress. 693 ; *Abrath v. North Eastern Railway Co.*, 11 App. Cas. 249 ; 16 C. R. C. 742].

Bonâ fide belief of prosecutor.

In a case of theft from a house the *bonâ fide* belief of the defendant that the thief could have made entrance into the house only through the house of the plaintiff, and in no other way, was held to be insufficient by itself to justify the defendant in charging the plaintiff with the offence [*Ismail v. Jacobs*, 7 S. C. C. 140].

Determination of prosecution.

The discharge of a defendant in a criminal case by the magistrate under section 168 of the Criminal Procedure Code of 1883 [see section 157 of the Code of 1898] was held in *Ismail v. Assen* [1 C. L. R. 18] to be a sufficient determination of the prosecution for the maintenance of a civil action for damages for malicious prosecution.

Action for malicious prosecution under English law.

Under the English law an action for malicious prosecution is given where a person acting maliciously, and without reasonable or probable cause, has preferred against another, in a criminal court, or before a judicial officer, a charge which in the event has been decided to be false, but which during its pendency has inflicted some injury to the property, person, or reputation of the

plaintiff. The plaintiff is put to proof of five things—(1) A criminal charge must have been preferred before a judicial officer [*Austin v. Dowling*, L. R. 5. C. P. 540.] (2) The charge must have been false in fact, and so determined by the proper criminal court before which it came. It is not necessary that the first court before which the charge came should have decided it in the plaintiff's favour. It is enough if a court of appeal has given a decision in his favour. A man may be perfectly innocent of a charge that has been made against him, and prepared with abundant evidence to prove the fact, yet if a judgment against him of a competent court remains on record, he cannot proceed with his action for malicious prosecution. (3) The prosecution must be malicious, that is to say, instituted from any other motive than the simple desire of bringing to justice one who, you believe, has committed a crime [*Stevens v. Midland Railway Co.*, 23 L. J. Ex. 328]. (4) The prosecution must have been without reasonable or probable cause. The question here is whether the defendant took reasonable care to inform himself of the truth of the charge [*Abrath v. The North Eastern Railway Co.*, 11 Q. B. Div. 450]. "The essential ground of this action," said Lords Mansfield and Loughborough in *Sutton v. Johnstone* [1 T. R. 493 and 510], "is that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied. From the want of probable cause malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt, and in neither

Things to be proved by plaintiff.

Charge before a judicial officer.

Charge must be false.

Prosecution must be malicious.

And without reasonable cause.

Plaintiff must have suffered damage.

case is he liable to this kind of action." (5) The plaintiff must show that he has suffered either in person, reputation, or pocket.

Can a corporation be guilty of malice?

The question has been mooted whether a corporation can be liable in an action for malicious prosecution. Baron Alderson was of opinion that such an action would not lie, because, in order to support it, it must be shown that the defendant was actuated by a motive in his mind, and a corporation had no mind [*Stevens v. Midland Railway Co.*, 10 Ex. 352]. This opinion was dissented from in subsequent cases [see *Green v. Lond. Gen. Omnibus Co.*, 7 C. B. (N. S). 290 and *Edwards v. Midland Railway Co.*, 62 Q. B. D. 287]. But in a case which came before the House of Lords in 1886, Lord Bramwell expressed in the strongest terms his opinion that such an action would not lie, because a corporation, as he thought, was incapable of malice or motive. The general current of authority is, notwithstanding, in favour of the proposition that such an action would lie [Brett. Com. Vol. I., p. 447. See also *The Pharmaceutical Society v. The Lond. & Prov. Supply Association*, 49 L. J. Q. B. 736 ; L. R. 5 App. Cas. 857 ; and Law Journ. 13th Feb. 1904, p. 80].

Roman-Dutch law on the subject.

M. de Villiers in his Treatise on the Roman and Roman-Dutch law of Injuries says that the question whether a corporation can be sued in a civil action of injury is not discussed in the text [that is, of Voet's title, *De Injuriis*, &c.]. Some remarks of the author elsewhere [Voet 3. 4. 5, 8 ; and 48. 4. 4] seem quite consistent with the view that it can [M. de Vil. 60].

Injury by words.

8. Injury is committed by words, if one sings or recites a song or ballad which tends to the shame of another ; or if one uses obscene and indecent words in the presence of decent people, or boasts of having cohabited with an honest woman or girl ; or, if contrary to the good manners of a civilised state, he defames, or causes to be defamed, a specific person to

his disgrace, whether present or absent, or at home or in a tavern or public place, or assails a private person or a judge against whose judgment he has appealed. This injury may be done directly or indirectly; for example, by deriding another with ironic praise or by exculpating himself from any vice or evil, and thus tacitly inculpating his adversary; for instance, if one says to a person whom he wishes to charge with fornication or murder—"At any rate *I* am not a fornicator or murderer." It is not essential that the abuse used towards another should involve some disgrace according to the law of nature or municipal law, since the loud mention and reproach of anything that contains nothing wrong may cause injury; for instance, if any one reproaches another with poverty or any other natural failing, and calls him a beggar, a cripple, or the like. Whatever is said or done with the object of injuring another may be classed as an injury, unless, in the case of reproachful epithets, it appears that they were used not with intent to do injury, but in jest in familiar conversation and in sport. The judge should decide, considering all the circumstances, whether injury was seriously intended [Voet 47. 10. 8].

Innuendoes when good must be adhered to.

In cases in which the defamation is indirect, it is necessary to explain the defendant's meaning by innuendoes. Where the plaintiff made several innuendoes on the defamatory matter complained of, and the defendants in their answer denied that the language used was capable of bearing the meanings attached to them by the plaintiff's innuendoes, it was held that it was not competent for the court to reject the meaning attached to the defamatory matter by the innuendoes, and to find that the publication complained of was otherwise libellous and actionable. Where an innuendo is bad, it may be rejected, and the plaintiff may rely on the libellous meaning apparent on the face of

the publication; but when it is good, the plaintiff must be bound by it, and fail in his suit, if he does not establish such meaning by proof [*Ramanathan v. Ferguson*, 6 S. C. C. 89].

Are mere words of abuse defamatory?

In *Gunetilleke v. Perera* [7 S. C. C. 154] Burnside, C.J., expressed a doubt that mere words of abuse were of themselves actionable. Any way, actions of slander for the mere use of abusive language should be discouraged. The plaintiff upon proof of the abuse should be awarded nominal damages only [*Ibid.*].

Re-asserting offensive imputation in answer.

Where, however, the defendant, in a case of defamation, deliberately re-asserts his offensive imputation in his answer, and cross-examines on the same lines, the plaintiff is entitled to damage, although the original abuse was trivial in itself [*Philip v. Barthelot*, Ram. Rep. 1863–1868, 189]. In *Jayewardene v. Aberan* [Ram. 1863–1868, 126] it was held that to call one a whore's son was defamatory.

Verbal injury prefaced by words of exaltation.

9. In the case of verbal injury it is no justification that it was prefaced by words of exaltation; unless the circumstances show that the words were used by way of reprimand and correction rather than with intent to cause injury. The defendant might absolve himself from the accusation by stating either at the instance of the judge or of the plaintiff that the words were not uttered by him with the intention of defaming the plaintiff.

Truth of words no defence, unless they were spoken for the public good.

Even if the slanderous words are true, the slanderer is not always absolved from an action for injury. He is so absolved, if it appears that in addition to the fact that the words are true, they were uttered in the interest of the state; as for instance, the imputation of a crime yet unpunished is excusable, because it is expedient and right that misdeeds of evildoers should be made known and avenged. If the defamatory words do not in anywise concern the public, as for instance, when they refer to a bodily defect, or a misdeed for which the offender has already been

punished, an action for injury would lie, although the words spoken be true. A charge of an offence made before a judge, which the accuser fails to prove, is not actionable, if he acted in good faith in the honest belief that the charge was true. A person who defames another cannot shield himself on the ground of public rumour, nor can he save himself from liability by offering to name the author of the slander. In Zealand, however, by naming the author, the slanderer was discharged, and freed from punishment for the defamation [Voet 47. 10. 9].

Criminal prosecution in good faith.

Offering to name author.

The simple plea of truth is no justification. To be a justification it must be stated and shown that the truth was uttered without malice and for a lawful purpose [*Perera v. Morris*, Ram. Rep. 1843–1855, 92].

Truth, no justification.

All persons, says Grotius, are liable for slander who either verbally or in writing, in the presence or absence of the party slandered, secretly or in public, make a statement whereby another's reputation is injured, even though the same is true, except when such statement is made to the authorities for the purpose of punishing crime [Grot. 3. 36. 2].

In English law truth of the words complained of is a complete defence. The reason being that the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. In Dutch law the rule on the subject is the same as in regard to criminal libel in English law. The truth of the statements is not a justification or defence, unless the words were spoken or written for the public benefit. There was some authority for the opposite view amongst the Dutch writers. Van der Keessel [Th. 803] holding that the truth was a defence; but the question has been settled for South Africa by judicial decision [*Botha v. Brink*, Buch. 1878, p. 118; Mor. Eng. and R.-D. Law, 238].

Truth, defence under English law.

Not so under the Dutch.

Injury by writing.

10. Injury is committed by writing, where anyone in a complaint submitted to the Sovereign or another, has maligned the reputation of another, or has maliciously composed, issued, published, communicated, or printed a defamatory title, history, comedy, libel, or ditty calculated to expose another to contempt or ridicule, or has maliciously caused something of the kind to be done. The fact that the author's name is not concealed does not make the publication any the less defamatory. If a libel is couched in such vague terms that no definite person who is libelled is indicated by it directly, indirectly, or tacitly, it is neither *famosus libellus* nor actionable as such. In the case of lampoons, inasmuch as they require time for their composition, and are the result of calm and settled judgment, the defence of action in the heat of passion has no place [Voet 47. 10. 10].

Non-concealment of author's name.

Instigation of injury.

11. A person may be guilty of injury by reason of his conspiracy with the person actually causing it, that is to say, by ordering that injury be done, or otherwise contriving to bring it about [Voet 47. 10. 11].

Cases of apprehended injury. Burden of proof.

12. Under the Roman-Dutch law, in the case of apprehended injury, the person from whom it is apprehended may be compelled to give security for good behaviour. The burden of proof in actions for injury, where the defence is a denial, rests on the plaintiff [Voet 47. 10. 12].

Actio injuriarum.

13. The action in case of injury was termed the *actio injuriarum*. The injured party was allowed to prove on oath the damage sustained by him, and damage was assessed having in view not the date of the judgment, but the time of the infliction of the injury. Damages varied according to the rank and position of the plaintiff and of the defendant, and also according to the time and place and gravity of the offence. An injury was considered more aggravated, if it was a blow in the eye rather than any other part

Assessment of damage.

of the body. The severity of the wound was also considered. Injury committed by ordinary slander was deemed less than that caused by wounds. It was graver, if done in a theatre, in court, in sight of the Prætor, on a Sunday or holiday, on a day of fasting or prayer, to a magistrate or senator by a common person, to a father or patron by his son or emancipated slave, than if done on an ordinary day, in solitude, in a lonely spot, by one from whom such an amount of respect was not expected. In estimating damages, regard was had even to the clothes in which the injured party was dressed, for a man's status, it was supposed, could be gathered from his clothes and apparel, and he was to be taken of such rank as his outward appearance indicated [Voet 47. 10. 13].

Apparel of injured party.

14. By the *Lex Cornelia* a civil action was competent for atrocious injury which is suffered by one in his own person and not in the person of another. The Prætor allowed an action to those indirectly affected. Damages in both actions were increased or reduced according to the circumstances of the case [Voet 47. 10. 14].

Lex Cornelia.

Prætorian action.

15. An extraordinary criminal procedure was also allowed on account of injury, the offender being punished, sometimes with great severity, at the discretion of the judge [Voet 47. 10. 15].

Criminal prosecution for injury.

16. A criminal prosecution was allowed against those who did injury to priests, ministers, and those engaged in service in sacred places, and the offenders were most severely dealt with [Voet 47. 10. 16].

Injury to ministers of religion.

17. But according to later practice, the action *ad palinodiam* [quite different from the *actio injuriarum*] for recantation of the injury was in use. This action was classed among civil rather than criminal proceedings, and it had place only in cases of verbal injury and injury by means of writings. In the case of real injuries there was no recantation, but rather a public admission of guilt and a prayer for forgiveness.

Action *ad Palinodiam.*

Recantation.

There was further no recantation where the words complained of were proved to be true; but the defendant was allowed to acknowledge to have acted contrary to good manners. A plaintiff who had been defamed really and verbally could write in the same plaint a prayer for recantation in respect of the verbal, and for forgiveness in respect of the real injury, and seek a specified sum as damages to be paid to him or the poor, by offering to declare on oath that he for such a sum or even for a greater would not like to be again subjected to such an injury. The judge modified the amount according to his discretion. This was the proceeding referred to when it was said that one could seek honourable and profitable amends. This action *ad palinodiam* did not die with the person verbally injured as was the case with ordinary actions for injury, criminal and civil, but it survived to the children or heirs who were interested in seeing that the good name and reputation of the deceased were not reviled by false slanders [Voet 47. 10. 17].

Honourable and profitable amends.

Proceeding in action as described by Grotius.

Speaking of this action Grotius says that if the statement complained of was untrue, compensation consisted in confession and prayer for forgiveness and declaration that the statement was untrue. If the statement was not untrue, but only improperly made, it would be sufficient for the slanderer to acknowledge that he had done wrong. In either case he was liable to a pecuniary penalty as well [Grot. 3. 36. 3].

Amende honourable and profitable.

In Dutch law, says Mr. Morice, the compensation for defamation took the form of the *amende* honourable and profitable. The *amende* honourable was of the nature of an apology. The *amende* profitable was fixed by the plaintiff naming a sum of money coupled with an oath that he would not endure such defamation for such sum. The money was generally awarded by the judge to the poor. This form of satisfaction was formerly the practice in South Africa, but has now

been superseded by the system of damages [Mor. Eng. and R.-D. Law, 239].

Whether this mode of compensation has been in vogue in Ceylon.

In Ceylon, in the case of *Moss v. Ferguson* [Ram. Rep. 1872–1876, 165] it was held that the Dutch forms of apology were obsolete, and compliance with them would not be insisted upon; but where an apology was necessary, one suitably adequate to the injury which resulted from, and was a natural consequence of, the words used, should alone be decreed. In this case the District Court had condemned the defendant to pay Rs. 100 to the poor through the Secretary of the Friend-in-Need Society, and to make an apology in a certain form of words prescribed by the judge; and the Supreme Court in the course of its judgment observed—"The palinode or recantation of the imputation cast on a party is one of the remedies prescribed by the Roman-Dutch law, and the law of other continental states which borrow their system from the civil law. It is valuable as calculated to reconcile animosities, to shorten litigation, and to reduce law expenses. But the form prescribed by the learned District Judge so far from producing such results is only calculated to embitter the state of feelings between the parties, and to render the prospect of reducing litigation of this class hopeless. The form prescribed is as follows—'That the defendant do ask pardon of the plaintiff in court for the injury he has done him, with a declaration that he is sorry for what has happened, and that he holds the plaintiff for a man of honour, against whose character and against whose professional conduct towards his patients he has nothing to say.' A recantation must be appropriate and co-extensive with the imputation cast upon the injured man. * * * The form prescribed is not only inappropriate, but it is obsolete. We asked the learned counsel who appeared for the parties, respectively, and the other learned gentlemen practising in our courts for information, but

none could adduce a single instance, ever since those courts were established, in which such a form was used, before the judge prescribed the same in the present case. The mode of procedure followed in the District Courts, is by no means binding on us, and we have in no instance followed the antiquated and, in some instances, even absurd forms which that procedure prescribes in certain cases. * * * The learned counsel for the plaintiff pressed for no particular form, but left it to us to prescribe an appropriate form. We have drawn out a form, which seems to us to be appropriate and co-extensive with the imputation thrown on the plaintiff, and is further clear and satisfactory. On the defendant subscribing to the apology, and publishing the same in his newspaper, the formal judgment of the court will be entered up." The defendant having in due course subscribed the apology referred to in the judgment, and undertaken to publish the same in his newspaper, and the Registrar having read the apology in open court, it was decreed that the judgment of the District Court condemning the defendant to pay to the poor through the Secretary of the Friend-in-Need Society Rs. 100 and to pay the plaintiff the costs of the District Court be affirmed, and that that part of the judgment of the District Court which prescribed a certain form of apology be set aside, and the apology referred to above be substituted therefor. It was further held in this case that words calculated to injure the feelings of a person are, under the Roman-Dutch law, defamatory, and, in a greater degree, the words likely to injure a person in his profession or in the esteem of others.

Words likely to injure a person in profession, &c.

Action allowed by AquilianLaw.

18. One who is defamed has no further remedy, either private or public, for the injury than the action for profitable and honourable amends, unless it be the action, *damni injuriæ*, by the *Lex Aquilia* for an indemnity, if the injury is followed by damage to one's

property. The Fisc started all criminal prosecutions for private delicts generally, and thefts in particular. If a private individual instituted a civil action on account of verbal or real injury, the Prætors or the Advocates-General intervened, and demanded that the plaintiff should prove the falsity, and the defendant the truth of the libel; and on failure of proof by either party, he was punished at the discretion of the judge, or was obliged to pay such damages as were imposed by statute [Voet 47. 10. 18].

Fisc started criminal prosecutions.

19. The action for injury was refused, if the injured party had not forthwith taken the injury to heart. If he practically condoned the injury, and thus abandoned his cause of action, he was not afterwards permitted to change his mind. But from temporary silence alone condonation is not to be presumed, for one often bears meekly an injury, for fear that it might be repeated with greater virulence [Voet 47. 10. 19].

Condonation of injury.

20. If the party accused had no intention to commit the injury, and did not act maliciously, he is not liable. Malice is to be gathered from the circumstances and the nature of the act, and in case of doubt is not to be presumed. If certain words used are ambiguous, then, in case of doubt, the better meaning is presumed to be that intended. So long as the words are susceptible of another [*i.e.*, innocent] meaning, the evil meaning is not to be presumed; but if the words spoken are such that they, *per se*, and according to their natural meaning, import contumely, then an injurious intent is presumed in the speaker, on whom lies the burden of proof that there was no malicious intent. Malice is presumed to be absent in a professional man, who, being consulted, gives an erroneous opinion, not having paid sufficient attention to the rules of his art or science or having followed false theories of his system. Voet places astrologers among professional men. If a magistrate roughly handles a person who resists him,

Evil intent or malice necessary to constitute injury.

Ambiguity in words used.

Burden of proof to show absence of malice is on defendant where words *per se* import contumely.

Erroneous opinion by professional man.

Injury by magistrate.

or reprimands with sharp words a person making an improper request or acting similarly, it is to be presumed that he acted, not with intent to injure, but within his rights to maintain his dignity. The same is the case when a tutor chastises his pupil, and an orator who inveighs against the immorality of the age, so long as he does not indulge in private spite. And so, he who does not permit anything to be done in honour of another commits no injury, nor one who strikes or wrestles with another in play, nor one who strikes another mistaking him to be a person under his power and subject to his correction, or whilst intending to chastise one under his power, accidentally injures a bystander. Nor does he commit injury who in self-defence reviles another. The case is similar where one who is defamed retorts with defamatory words, for injuries are in this wise considered to be set off one against the other, so far as the civil remedy is concerned, provided that the retort or defence against the injury is suitably moderated [Voet 47. 10. 20].

Tutor chastising pupil.

Injury in play and under mistake.

Accidental injury.

Setting off of injuries.

Malicious intent.

The requirement of malicious intent to constitute verbal injury under the Roman-Dutch law was recognised in the case of *Lakeman v. Bain* [Ram. Rep. 1863–1868, 169]. A wrongful act done intentionally, without just cause or excuse, is malicious [*Tissera v. Holloway*, 1 S. C. C. 29, see column 2].

Defamatory allegations in answers.

The fact of the defendant having by his answer made certain uncalled for defamatory allegations against the plaintiff, and pleaded justification which he failed to prove, must be taken into consideration as part of the evidence in the case relevant to the question of malice [*Tissera v. Holloway*, 1 S. C. C. 29].

Absence of malice presumed, if occasion is privileged.

Under the English law, in all cases of defamation, the absence of malice may be presumed, when it is shown that the occasion on which the alleged injury was committed was what in law is called a privileged occasion. This presumption may, however, be rebutted

by evidence that the defendant was actuated by some special spite or some wicked and malicious motive. In all other cases of defamation under the English law, malice [although the pleader invariably alleges that the words were spoken or published falsely *and maliciously*] need never, in fact, be proved at the trial. The words are actionable, if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth. In *Abrath v. North Eastern Railway Co.* [11 App. Cas. pp. 253, 254, 55 L. J. Q. B. 460] Lord Bramwell said—"That unfortunate word 'malice' has got into cases of action for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication. He would be liable, although he had not a particle of malice against the man."

And malice must be proved to render defendant liable.

In other cases there need be no malice to constitute defamation.

In Dutch law the *animus injuriandi* is an essential ingredient of defamation. As this is defined by Voet as a form of *dolus* or evil intention, it probably corresponds to the original meaning of the English word, malice, as applied to defamation. The *animus injuriandi* has been defined as the intention to injure. But it is impossible to make the mental state of the defendant the practical test either in defamation or in such an *injuria* as malicious prosecution [*McLoughlin v. Impey*, Buch. 1875, p. 77]; and in such cases reckless or careless statements will be taken as proof of the *animus injuriandi*. Thus, just as malice in the English law of defamation has lost its definite meaning, so the *animus injuriandi* seems in its practical application to be reduced to something far short of the intention or desire to injure. There is, however, an important

The *animus injuriandi*.

difference between English and Dutch law on this point. This is expressed by *Sir Henry de Villiers in Botha v. Brink* [Buch. 1878, p. 128] and repeated in the later case, *Bennett v. Morris* [10 S. C. 223]—"The rule of the Roman-Dutch law differs if at all from that of the English law in allowing greater latitude in disproving malice. Under both systems, the mere use of defamatory words affords presumptive proof of malice; but under our law, as I understand it, the presumption may be rebutted, not only by the fact that the communication was a privileged one—in which case express malice must be proved—but by such other circumstances [examples of which are given in Voet 47. 10. 20] as satisfy the court that the *animus injuriandi* did not exist." Some of the circumstances that rebut the presumption of the *animus injuriandi*, which are given by Voet [47. 10. 20] are jest, error as to the person when there would have been no wrong done to the person intended, mental incapacity through childhood or otherwise, provocation by an insult of equal magnitude. The last-mentioned circumstance has been successfully pleaded in several South African cases. Thus in *Herscheussolm v. Cohen* [1 Kotze. Transv. 255], the court held that the defendant had used the words "thief" and "swindler," *in rixa* and *ab iræ impetu*, and that these words had been compensated by what the plaintiff himself had said of the defendant [Mor. Eng. and R.-D. Law, 236, 237].

How malice may be refuted.

To sum up, the *animus injuriandi*, which is an ingredient of defamation and other injuries in Dutch law, practically corresponds to the malice which is nominally an ingredient of defamation in English law, but while malice in English law, when the words are *primâ facie* defamatory, can only be refuted by showing that the occasion was privileged, or that the words are honest and fair expressions of opinion on matters of public interest and general concern, Dutch law

allows proof not only of such circumstances as that the occasion was privileged, but of any other circumstances that furnish a reasonable excuse for the use of the words complained of. As regards such points as privilege and express malice, where there is qualified privilege, and fair criticism on public matters, the tendency in South Africa is to follow the English decisions and text-books. The rules laid down are in accordance with the principles of Dutch law, except perhaps in regard to absolute privilege, for which, however, there is much to say on the ground of policy [*Ibid.*].

Privilege and express malice.

On the question as to how far privilege is a defence to a charge of defamatory communication the following are among the more important decisions of the Supreme Court.

Summary of decisions on question of privilege being a defence.

The defendant, a member of a club, wrote to the Committee of the club a letter in which he called the plaintiff, another member, a liar. The letter was written upon the Committee demanding of the defendant an explanation of his conduct in posting on the walls of the club a placard declaring the plaintiff to be a liar. It was held that the letter was not a privileged communication [*Parsons v. Selby*, Ram. 1843–1855, 52].

One member of a club writing to Committee against another.

Where a servant was dismissed from his master's service for repeated drunkenness, and the master, without malice, transcribed on the face of the servant's previous characters the reason for his discharge from his service, it was held that the writing constituted a privileged communication to persons to whom the servant would in ordinary course show the characters, and was not actionable [*Peter v. Neate*, 6 S. C. C. 4]. But the circumstances of a particular case may show that defamatory words used in reply to an inquiry from an employer for the character of the employé are not to be allowed to serve as an excuse for the defamatory wrong done to the servant [*Tissera v. Holloway*, 1 S. C. C. 29].

Writing across character of servant.

Defamatory words in reply to inquiry about servant.

Entry in pocket register.

An entry in a pocket register as to a servant's character or a letter to the Registrar of Servants as to the cause of discharge of a servant is a privileged communication [*Fernando v. Walton*, 3 S. C. R. 140; *Anthony v. Maclean*, 3 S. C. R. 142]. Where the occasion is privileged, *bonâ fides* must always be presumed, and the *onus* of proving malice and absence of *bonâ fides* rests on the plaintiff [*Ibid.*].

Master's liability to justify bad character given to servant.
Pleas of justification.

A master who does not justify the bad character given by him to his servant in the register book is liable in damages. Pleas of justification ought to be strictly proved, and must be directed to cover the particular imputation made [*Fonseka v. Gibbs*, Ram. Rep. 1872–1876, 93].

Representation to Municipal Council of illicit sale of opium.

In *Silva v. Ramen Chetty* [1 N. L. R. 225] defendant presented a petition to the Secretary of the Municipal Council of Kandy containing the statement that certain persons, including the plaintiff, were selling opium and bhang secretly with the intention of making money fraudulently against the government, and it was held that the words were *per se* contumelious, and their publication should be presumed to have been made with a contumacious intent in the absence of proof that the defendant wrote the words complained of *sine injuriandi animo et affectu*.

One employé charging another with irregularities.

In the absence of malice a letter to an employer by an employé complaining of irregularities on the part of another employé is privileged [Aust. 137]. A letter in answer to another repeating a statement that originated with the writer is not privileged [Aust. 180].

An action will not lie against a master for not giving a servant a character. The answer of a master to inquiries concerning the character of his former servant is a privileged communication; and a statement volunteered by a former master correcting statements in a character previously given is also a privileged

communication [*Carrol v. Bird*, 3 Esp. 201; *Gardener v. Slade*, 18 L. J. Q. B. 335; 17 C. R. C. 245].

Petition to Governor.

A petition to the Governor against a public officer in a matter in which the petitioner has an interest is in its nature privileged, and evidence of express malice must be given before a plaintiff can recover damages [Gren. 1873, Part II., p. 29].

Information to Director, Public Works, against subordinate officer.

In *Winslow v. Brito* [8 S. C. C. 158] the defendant, the owner of an estate on which coolies were employed, informed the Director of Public Works, whose subordinate officer the plaintiff was, that the plaintiff had been in the habit of embezzling the public funds by rendering false accounts of expenditure for works on the public roads. The defendant *bonâ fide* believed the truth of the information so given. It was held that the defendant's communication was privileged, and that on the plaintiff's failure to prove malice in fact on the defendant's part, judgment must be given for the defendant.

Words used in examination in court.

An action for slander will not lie for words used by a party in the course of his examination in court [2 Lor. 122].

Report of headman.

The report of a headman made to a Government Agent, in response to an order to report upon the petition of an applicant praying for a post under the Government Agent is a privileged document which cannot form the basis of an action for defamation, unless the plaintiff is able to establish that the statements in the report are untrue, and made maliciously [*Dahanaike v. Jayasekera*, 5 N. L. R. 257; 3 Br. 366].

Where there is absolute privilege proof of malice is unavailing.

Where there exists an absolute privilege, *e.g.*, such as is enjoyed by a witness giving his evidence in a judicial cause or matter, proof of actual malice will not support an action for libel or slander [*Daukins v. Lord Rokeby*, 43 L. J. Q. B. 8; 9 C. R. C. 39]. Similarly, no action lies against an advocate [barrister or solicitor]

Privilege of counsel.

for defamatory words spoken with reference to and in the course of an inquiry before a judicial tribunal, even if they are uttered maliciously [*Kennedy v. Broun*, 32 L. J. C. P. 137 ; *Munster v. Lamb*, 52 L. J. Q. B. 726 ; 7 C. R. C. 714].

Reports of judicial proceedings.

Under the English law every impartial and accurate report of any proceeding in a public law court is privileged, unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication [Odg. on Lib. and Sl. 248] ; and every fair and accurate report of any proceeding in either House of Parliament, or in any committee thereof is privileged, even though it contain matter defamatory of an individual [p. 264]. Every one has further a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subject, but he must not abuse it [p. 32]. And by the Newspaper Libel and Registration Act, 1881 [44 and 45 Vict. c. 60, s. 2] it is provided as follows—"Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened, for a lawful purpose, and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always that the protection intended to be effected by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

Proceedings in Parliament.

Comment on matters of public interest.

Reports of proceedings of public meetings.

21. The prætorian action for injury was prescribed in one year, and the year began to run from the time that one began to know that he had been defamed. The right of action under the *Lex Cornelia* endured for thirty years [Voet 47. 10. 21].

Prescription in case of injury.

As in the case of the prætorian action referred to above, in the case of right to compensation arising from slander, prescription begins to run after the slander has come to the knowledge of the slandered person [see Grot. Tr. Maas. 487, n.].

22. The action for injury dies with the death of the person injuring as well as of the person injured. It is not competent either to or against heirs, unless the death occurred after joinder of issue, in which case the action is transmitted to the heirs, and it may be continued by or against the heirs as the case may be of the deceased. Under the Dutch procedure death is presumed to have taken place before litiscontestation, if the party charged with having committed the injury die before the service of the final citation [Voet 47. 10. 22].

Action dies with death of person injuring and person injured.

Death after joinder of issue.

23. The action for injury is removed by the reparation made by the party causing the injury, by pact or settlement, also by oath; that is, if the defendant, on the requisition of the adverse party or the judge, swears that he has not committed the injury, and had no intention to injure the adverse party, and that such party did not deserve the defamation. The action is also taken away if, before litiscontestation, in the case of verbal injury, the defendant protests that he will not stand by what he has said, the same having been spoken in anger and haste. Further the cause of action is removed by condonation either expressly or tacitly, when the ordinary indications of friendship are present, such as social gatherings, feasts and reunions, and other signs of restored friendship. Although remission of the injury by the injured party puts an end to the

Reparation by pact, settlement, or oath.

When condonation may be presumed.

Criminal prosecution not affected by remission of injury by injured party.

action, the criminal prosecution which is in the hands of the prætor and the officers of the Crown is not affected thereby. Where a cause of action accrues to several persons by one defamatory act, condonation by one only bars that person. The others who have suffered from the injury may proceed with their remedy [Voet 47. 10. 23].

Condonation by one of several persons injured does not affect rights of the others.

Action for honourable and profitable amends may be concurrent with criminal prosecution.

24. All proceedings for injury in the olden time ceased when once the injured party brought his action. Even a criminal prosecution was thereby put an end to, unless the prætor enjoined the plaintiff to abandon the civil action to enable him to initiate or continue criminal proceedings. In later times, however, the civil action for honourable and profitable amends could be concurrent with the criminal prosecution or the action *ex lege Aquilia* [Voet 47. 10. 24].

Printing newspapers.

Liability of sellers of newspapers for libel.

Ordinance No. 5 of 1839 makes provision for the printing and publishing of newspapers in this colony. An "innocent disseminator," *e.g.*, the seller of a newspaper in the ordinary course of his business, is not liable, if he, without negligence, did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter; but a person is liable, as the publisher of a libel, where he has communicated libellous matter to another requesting or intending that the latter should publish it, and where the substance of the communication has been published accordingly [*Parkes v. Prescott*, 38 L. J. Ex. 105; *Emmens v. Pottle*, 16 Q. B. D. 355; 9 C. R. C. 16].

Communication made in discharge of duty.

A communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned, is privileged to the effect that no action can, in the absence of proof of malice, be maintained in respect of the statements contained in the communication. Evidence of statements made by the defendant subsequently to the libel is

admissible for the purpose of showing malice at the time of publication of the libel [*Toogood v. Spyring*, 1 Cr. Mee. & Ros. 181; *Hemmings v. Gasson*, 27 L. J. Q. B. 254; 9 C. R. C. 71].

Slander of title.

Slander of Title in English law consists in false and malicious statements as to the right or title of another to property. Unlike ordinary defamation, slander of title requires proof of actual malice as well as of special damage. In Dutch law it would seem that slander to title hardly comes under *injuria* in the proper sense, as no personal insult is involved in it. There seems no reason, however, why there should not be an action in cases where there would be an action in English law for slander of title, and such actions have been brought in the courts of South Africa [Mor. Eng. and R.-D. Law, 239].

SECTION IV.

OBLIGATIONS RESULTING FROM QUASI CRIMES.

Liability for actions due to negligence, inadvertence, &c.

IN like manner as there are *quasi* contracts so are there also *quasi* crimes, as when we occasion damage to another by any act of ours which, although not punishable by law, yet on account of our negligence or inadvertence subjects us to damages. For instance, when we carelessly throw or cast anything down from the upper part of our house, whereby damage is occasioned to the clothes, &c., of the passers-by; or when a fire, occasioned in your house through your carelessness, is communicated to mine; or when the baggage of travellers is stolen through the negligence of the masters of vessels or innkeepers [V. d. L. 1. 16. 6]. In this way, an action lies to the widow and children of a deceased person who were dependent on his labour for support against those who had caused his death, although it had been occasioned not by *malice prepense*, but by carelessness, as, for instance, by the negligent or unskilful driving of a coachman [V. d. L. 1. 16. 2].

Rights of widow and children of injured person.

Liability for act of servant.

A person is sometimes liable for the acts or defaults of his servant, that is, in cases in which the matter complained of flows from something incidental to the employment for which the servant is hired, or where the servant is acting in furtherance of his master's interest [*Mitchell v. Crassweller*, 22 L. J. C. P. 100; *Limpus v. London General Omnibus Co.*, 32 L. J. Ex. 35; 17 C. R. C. 252].

Act of independent contractor.

Where, however, the owner of premises employs an independent contractor for an operation to be performed on them, the contractor and not the owner is liable for damage arising from negligence of the workmen in carrying on the operation; but where a person engages

a contractor to perform a work which is in itself unlawful, and damage is caused by the operations, although carried out in a manner which, if the work were lawful, would be proper, the act causing damage is considered as the direct act of the primary employer, and he is liable accordingly [*Reedie v. London and North-Western Railway Company*, 4 Exch 244; *Ellis v. Sheffield Gas Consumers' Company*, 23 L. J. Q. B. 43; 19 C. R. C. 168].

When negligence is ground of legal liability.

To constitute negligence a ground of legal liability there must be the omission to do something that a reasonable man would do, or the doing of something that a reasonable man would not do [*Blyth v. The Birmingham Waterworks Company*, 11 Exit. 781; 18 C. R. C. 621].

Care to be exercised in conduct of affairs.

Every person in the conduct of his own affairs is bound to act with the care to be expected of a man of ordinary prudence, and if damage results to a neighbour from his failure so to act, he is liable as for an injury [*Vaughan v. Menlove*, 3 Bing. N. C. 468; 18 C. R. C. 715]; and where liability for negligence is established, the circumstance that the amount of damage was enhanced by inevitable accident is no defence against a claim for the whole damage [*Smith v. London and South-Western Railway Company*, L. R. 6. C. P. 14; 18 C. R. C. 726].

Damage enhanced by accident.

Liability for damage even in the absence of negligence.

If a man brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned [*Fletcher v. Rylands*, L. R. 3. H. L. 300]; and [*Per* Ld. Cranworth] if a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible.

however careful he may have been, and whatever precautions he may have taken to prevent the damage * * * and the doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound, *sic uti suo ut non lædat alienum.* And so, in the case of *Elphinstone v. Boustead* [Ram. Rep. 1872-1876, 268] it was held that where damage was caused to a coffee estate by fire spreading into it from a neighbouring land where jungle had been set fire to, it was not necessary to prove negligence, even though averred in the libel, on the part of the defendant or his agents.

Injury in derogation of legal rights.

Negligence, in order to be actionable, must further be in derogation of a legal right in another person. So, where plaintiff and defendant owned adjoining lands planted with coffee, and the defendant's land being overgrown with weeds, the seeds of such weed were blown and carried into the plaintiff's land entailing upon him double the expense that was incurred when defendant's land was kept free from weeds, it was held that the defendant's omission to keep his land clean was mere *culpa*, and therefore not actionable, unless a legal right had been injured by it, and there was nothing to show sufficiently any right on the part of plaintiff which had been injured by the omission.

Damage claimed must be natural consequence of act complained against.

Damages that are not the natural, probable, immediate, or proximate consequence of a wrongful act are not recoverable. So, where by a negligent act of the defendant a collision with a railway train at a level crossing became imminent, but the actual collision was avoided, it was held that a nervous shock or mental injury, caused by fright at the occurrence, was too remote a consequence of the defendant's act to be a ground of damage [*Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222 : 8 C. R. C. 405].

Damages not reduced in consequence of sum paid by insurers.

In an action for injuries caused by negligence, the defendant is not entitled to reduce the damages to be paid by him by a sum paid to plaintiff by insurers in respect of the same cause of damage [*Yates v. Whyte*, 4 Bingham, N. C. 272 ; *Bradburn v. Great Western Railway Co.*, L. R. 10. Ex. 1. ; 8 C. R. C. 428].

Measure of damage when defendant has acted *bonâ fide*.

Where the defendant has acted *bonâ fide*, the damages payable by him should not exceed the bare loss sustained by the plaintiff. So, where in a suit for an account of plumbago wrongfully quarried by the defendant it was found that the working of the mine had been carried on by the defendant in the *bonâ fide* belief that it belonged to him, the court held that the defendant was bound to pay only the fair market value of the plumbago after deducting his working expenses [*Van Cuylenberg v. Harmanis*, Ram. Rep. 1872–1876, 127. See *Hilton v. Woods*, 36 L. J. Ch. Div. 941].

Injury from bolting horses.

A wagoner or countryman whose horses bolt even though without any fault on his part is bound to make compensation [Grot. 3. 18. 12].

Person causing injury is liable, if his act was in any way intentional.

In *Sollamuttu v. Fraser* [7 N. L. R. 179] the driver of the defendant's horse which had been alarmed by the rattle of the shutters of a shop could not rein in the animal, but was able to some extent to guide it while rushing down the road. If he allowed the horse to continue in the line it took, death would have ensued. The only alternative was to turn to the left, and take the chance of passing between a tree and some carriages among which was the plaintiff's carriage. The driver guided the horse in that direction, but it came violently into collision with the plaintiff's horse and carriage, killing the plaintiff's horse and injuring his carriage. It was held that the plaintiff was entitled to recover damage. Inevitable accident would not give rise to a cause of action for damages, but it is only an act which is neither intentional nor negligent that would fall under that category.

Inevitable accident.

Onus of proving negligence.

The mere happening of an accident does not throw on the defendant the *onus* of disproving negligence, nor does the mere fact of a horse bolting raise a *primâ facie* presumption of negligence [*Silva v. Pate*, 2 S. C. R. 71]. Where a person's horse shied at a cart, and thus brought his carriage into violent collision with another's phaeton, it was held that the former could not be said to be guilty of negligence [*Davies v. Mitchell*, 1 S. C. R. 206].

Accident under English law.

A person engaged in a lawful act is not responsible for damage arising from a pure accident in the doing of it [*Davis v. Saunders*, 2 Chitty, 639 ; 1 C. R. C. 203].

Absence of ordinary diligence.

Where such ordinary diligence and skill as persons exercise, who properly discharge their duty, could have prevented the disaster, there is not an inevitable accident [*The Uhla*, 19 L. T. N. S. 89 ; 1 C. R. C. 210].

Liability of common carrier for accident.

A common carrier is liable for events which, though not preventible by him, are assignable to the intervention of man [other than the King's enemies] ; but he is not liable for an accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, pains, and care, reasonably to be expected of him [*Forward v. Pittard*, 1 T. R. 27 ; 1 C. R. C. 216].

Possible accident would not excuse negligence.

Where a defendant charged with negligent damage has been guilty of such negligence as would have produced the damage complained of, he cannot excuse himself on the ground of inevitable accident by showing that the damage would have been incurred through an unavoidable cause, although he had done his duty. But if he can show that a substantial and fairly ascertainable portion of the damage which actually happened is to be attributed solely to that unavoidable cause, the liability for damage will be apportioned [*Nitro-phosphate Co. v. London and St. Katherine Docks Co.*, 9 Ch. D. 503 ; 1 C. R. C. 276].

The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, is *primâ facie* answerable, if it escapes, for all the damage which is the natural consequence. So that, where the defendant collected water on his land by means of a reservoir, and the water as soon as the reservoir was half-filled escaped through underground shafts in old workings which were unknown to the defendant, and flooded and damaged the plaintiff's mine, the defendant was held liable for the damage. But the storing of water by a person on his own land in a reservoir constructed in a proper manner and so as to be in fact sufficient when full, under ordinary circumstances, to contain the water, is an act not in itself unlawful; and a person so storing it is not answerable for damage effected by the escape of the water, if the escape is caused by the act of God or the King's enemies, without any fault on the part of the defendant. And if a reservoir so constructed gives way by the action of a flood so great that it could not reasonably have been anticipated, the defendant by showing this, and proving that all reasonable care was taken in the construction and maintenance of the reservoir, will be exonerated [*Fletcher v. Rylands*, L. R. 3 H. L. 330; 1 C. R. C. 236].

Liability of occupiers of tenements for unsafe condition of premises.

The occupier of a tenement is bound to take care that no danger to the public arises from the state of his premises; and is *primâ facie* liable to a person who, while in a place where he has a right to be, is damaged in consequence of the unsafe condition of the premises [*Kearney v. London Brighton and South Coast Railway Co.*, L. R. 6 Q. B. 759; *Tarry v. Ashton*, 1 Q. B. D. 314; 19 C. R. C. 1].

Neglect to maintain fence.

Where, as between adjoining owners, one of them is bound by statute or prescription to maintain a fence, he is liable to the adjoining owner for damage arising to cattle lawfully upon the land of that adjoining owner,

of which neglect to repair that fence is the proximate cause. But he is not liable to the owner of other neighbouring land for damage to his cattle which have got through the fence by trespassing upon the intermediate land [*Booth v. Wilson*, 1 Barn. & Ald. 59; *Ricketts v. East and West India Docks, &c., Co.* 21 L. J. C. P. 201; 19 C. R. C. 15].

Disregard of statutory obligation.

Where a statute of a public character prescribes in regard to a class of persons the performance of certain acts as reasonable precautions for the health or safety of a class of persons, the neglect of such a statutory precaution gives a right of action to any person, within the scope of the intended benefit, who, by reason of the neglect, suffers damage of the kind intended to be provided against [*Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130; *Baddeley v. Earl Granville*, 19 Q. B. D. 423; 19 C. R. C. 42].

Liability of person who invites another, to keep premises in safe condition.

A person who invites another to come on his premises upon a business in which both are concerned is bound to take care that his premises and all appliances provided by the owner as incident to the use of his premises are safe for that other person to come upon and use as required; or else to give due warning of any danger to be avoided. But where the stranger comes as a guest or by a bare license, the owner of the premises is only bound to warn him of anything in the nature of a trap upon the premises [*Southcote v. Stanley*, 1 Hurl. & Nor. 247; *Indermaur v. Dames*, L. R. 1 C. P. 274; *Heavn v. Pender*, 11 Q. B. D. 503; 19 C. R. C. 60].

Person having in possession dangerous instrument.

A person having in his possession an instrument of danger, such as a loaded gun, is bound to keep it with care; and if damage ensues, as the natural and probable consequence of the want of such care, he is liable [*Dixon v. Bell*, 5 Maule & Selw. 198; *Clark v. Chambers*, 3 Q. B. D. 328; 19 C. R. C. 26].

When cause of action arises in case of injury.

In the case of injury, when the extent of the actual loss is doubtful, the cause of action arises when the doubt ceases. So, where an injured animal dies of the injuries some months after the infliction, the cause of action to recover its value accrues to the owner on the death of the animal [*Fielding v. The Municipal Council of Colombo*, 2 Br. 196].

Legal fault.

Legal fault is two-fold, namely, fault resulting from acts of omission and fault resulting from acts of commission. The *Lex Aquilia* provided a remedy for that which consisted in commission, or in commission and omission together, but not in omission alone [Voet 9. 2. 3].

Neglect of statutory duty.

Where a new duty is created by statute with a penalty for not performing it, the question whether a right of action is given by the creation of the new duty depends upon whether it appears from the terms of the statute that the intention was by the mere infliction of a penalty to protect the public and deter persons from committing breaches of the statutory duty, or to give a right of action to persons injured by the default complained of [*Kuttalam v. Velu*, 7 N. L. R. 177].

Responsibility of persons incorporated for public purposes.

Persons associated or incorporated for public purposes with statutory powers are, in the absence of statutory provisions as to their liability, not responsible for accidents occurring through the use of their statutory powers in a manner necessary for carrying out the public purposes, provided they have taken every precaution, and adopted every means in their power to prevent damage [*Vaughan v. Taff Vale Ry. Co.*, 29 L. J. Ex. 247 ; 1 C. R. C. 296].

Neglect by medical man.

A doctor performing an operation skilfully, but afterwards neglecting his patient ; a fire-watcher sleeping at his post ; a wagon-driver from whose wagon a stone has fallen and broken or crushed anything, are all liable under the *Lex Aquilia* ; for these commit wrongful acts by undertaking a duty and not fulfilling.

They need not have let their services to another, but having done so, it is incumbent on them to discharge the duty; and in these cases they are taken to have committed a wrongful act as well by undertaking the work as by not completing it [Voet 9. 2. 3].

Recovery of fees by medical men.

It may here be mentioned that in Ceylon a medical man may recover fees for attendance as such although a by-law of the College of Physicians of which he is a member prohibits its members from recovering fees [*Thwaites v. Ryan*, Ram. 1863-1868, 228]. Even a native medical practitioner is entitled to sue for his fees [Ram. 1877, 259].

Liability of judicial officers, surveyors, notaries, &c.

A judge who gives judgment contrary to laws which ought to be known or who grants time contrary to law, a surveyor who makes an incorrect survey, and a notary who draws a deed contrary to law even though merely through ignorance, are liable for all the damage that any one may suffer thereby [Grot. 3. 37. 9]. And so, where homicide is the result not of anger but of negligence, the person at fault is liable in compensation, as for instance, negligence and ignorance on the part of a physician, a midwife, negligence and ignorance on the part of a coachman or master of a ship, or incapacity of the same in managing the ship or horses. Judges who have condemned any one to death in an illegal manner are also guilty of homicide [Grot. 3. 33. 5].

Of physicians, midwives, coachmen, masters of ships, &c.

Judges.

Skill necessary in person who undertakes service.

The duty required from a person who undertakes a service for reward is to provide the skill, and use the care to be expected from persons generally who make such service their business. The want of such skill or care is "negligence" for which the undertaker is responsible; and the term "gross negligence," when used in connection with such a duty, is to be understood as "negligence" in the sense of the general rule [*Purves v. Landell*, 12 Cl. and Fin. 91; *Beal v. South Devon Railway Co.*, 5 Hurl. and Nor. 875; 18 C. R. C. 629].

Immunity of judges in England from liability for wrongful acts.

In England, a judge of a court of record is not answerable in a court of law for anything done or said by him in his judicial capacity, although corruption as well as malice and want of probable cause are alleged against him [*Floyd v. Barker*, 12 Co. Rep. 23; *Scott v. Stansfield*, L. R. 2 Ex. 220; 15 C. R. C. 37].

A judge who adjudicates improperly is not bound to make good the loss, unless either fraud or clearly inexcusable blame can be shown [V. d. K. 808].

Innkeepers.

Innkeepers, although they seem to receive their hire merely for the bare use of the inn, are nevertheless obliged to look after property brought into the inn, and to be responsible for the same. They are not only liable for their own acts, but also for the acts of those whose services they employ [V. L. 4. 2. 10]. They are liable to compensate, and make good the damage which the travellers have suffered to property brought into the inn, and accepted by them, whether the damage be caused by their employés or servants, or even by the other guests allowed in the inn [V. L. 4. 39. 3].

Whence liability arises.

The liability of an innkeeper for goods brought to an inn is limited to those cases in which the relation of landlord and guest exists [*Bennett v. Mellor*, 5 Term. Rep. 273; *Strauss v. County Hotel & Wine Co.*, 12 Q. B. D. 28; 13 C. R. C. 118].

Guests at a hotel.

In an action for recovery of the value of portions of a bicycle left in a hotel by a guest who came in for refreshments, it was held that in such a case there was no distinction to be drawn between guests who lived there and other guests; and that a notice to guests that "no responsibility shall attach to the hotel for any property lost, unless previously placed in the manager's charge for safe custody," would not limit his responsibility; and that the hotel keeper was liable for the value of the articles lost [*Mandy v. Galle Face Hotels Co.*, 4 N. L. R. 191: 1 Tamb. 48].

Lien of innkeeper.

The lien of an innkeeper, it may here be mentioned extends over goods brought to the inn by a guest as his luggage, although known by the innkeeper to belong to a third person [*Threfall v. Borwick*, L. R. 10 Q. B. 210; *Robins v. Gray* (1895) 2 Q. B. 502; 13 C. R. C. 136].

Liability of innkeepers, &c., in respect of property brought to their establishments by travellers, &c.

Innkeepers and ostlers are presumed to have undertaken the custody of anything put into their hotel or stables, although they may not have accepted money for it. Hence, they are liable in damage for loss of or injury to an article so put in [Voet 4. 9. 1]. Whether the article belonged to the customer or to some one else, the former may sue, and the action is allowed against the heirs of the party liable. If several persons managed the hotel or stables, each was liable *in solidum* [Voet 4. 9. 2]. Where, however, the hotel or stable is broken into, and the traveller's goods or horses are stolen, no liability arises, provided there has been no neglect or *culpa* on the part of the innkeeper or ostler. The proof of such cause is upon the latter. The liability remains the same whether the loss or damage has been occasioned by the servants of the innkeeper, &c., or by fellow-passengers or travellers [Voet 4. 9. 2].

Unskilfulness of professional men.

Ignorance or want of skill in a person professing an art or obtaining money for the exercise of it is reckoned as a legal fault, as is also want of strength [*infermitas*]; since no one ought to affect that in which he knows or ought to know that his want of skill or strength would be injurious to another. Thus under the *Lex Aquilia*, doctors, chemists, or midwives performing operations unskilfully, or wrongly dispensing, administering, or mixing drugs, and giving poisons instead of the proper medicines, were liable, and so mechanics and artificers are liable who through no defect in the article given them to work upon, but through their own want of skill, have broken it [Voet 9. 2. 23].

A proctor is liable in damages to his client who has suffered loss through the proctor's culpable want of

care and diligence in ascertaining the real facts of the case in which he was employed by the plaintiff and in preparing the pleadings, evidence, and appeal [*Candappa v. Vanderstraaten*, Ram. 1843-1855, 26].

Solicitor not liable for errors of judgment.

To make a solicitor liable for negligence in the conduct of an action, he must be shown to have been guilty of what has been described as *culpa lata* or *crassa negligentia*. He is not answerable for errors of judgment upon points of new occurrence, or of nice or doubtful construction [*Godefroy v. Dalton*, 6 Bing. 460; 24 C. R. C. 656].

Liability of horse-breaker.

A horse-breaker is liable in damage to the owner of a horse which has suffered by reason of his unskilful and improper treatment [Gren. 1873. Part II., p. 26].

Practice of games at unsuitable places.

Those who being engaged in lawful practices or games cause damage through non-observance of what is necessary in regard to time, place, or persons, or who knowingly and wilfully injure others, although in point of time, place, or person they may be free from blame, are, equally with those already enumerated, liable under the *Lex Aquilia* [Voet 9. 2. 24].

Liability of aiders.

Persons who, having undertaken a duty or being otherwise engaged in a lawful act, cause damage or injury through fraud, imprudence, or want of skill; those again by whose assistance, instigation, exhortation, or advice damage has been occasioned; and those to whose wantonness or anger damage is attributable, are all equally liable for the loss sustained by the injured party. There were, besides, liabilities created by various other kinds of torts. Thus, a master who having the right of inflicting a moderate amount of chastisement upon his pupils or apprentices has exceeded that bound by the fury and severity of his punishment; magistrates who acting tortiously in the discharge of their duty do anything *contra bonos mores*, causing another damage; the captain of a ship and the sailors by whose fault the vessel has collided with the nets,

Magistrates acting tortiously.

boat, or vessel of another and caused damage when it was in their power to prevent the occurrence; and owners of ships which sailing in shallow parts having neglected to have a pilot on board according to custom have occasioned loss to others, are all liable in damage to the injured persons [Voet 9. 2. 14 *et seq.*].

In the case in which reparation has to be made for damage, only that damage is considered which was caused directly by the act [*in continenti*] and not that which was afterwards caused by a new agency, although this was brought about by the first. Voet mentions the following as tort feasors belonging to one or another of the different classes specified above—Carriage or cart drivers who, in trying to outstrip other vehicles, overturn the cart, and cause danger; a wagon driver from whose wagon, unskilfully laden with stones, a stone falls and crushes or breaks anything, or whose wagon going uphill runs backward, not accidentally, but through fault of the driver, and so causes damage; a muleteer who by overloading his animal causes it to fall, and by overturning its burden on some one else occasions injury, or who overloading some one else's animal causes it to fall, and break any of its limbs; a person who, when he had himself taken up more than he could carry, by throwing it down and crushing the property of some other person close by, or who, having himself fallen with the load, has caused damage to property belonging to some one else, whether he took up more than he was able to carry when it was in his power not to have so overloaded himself, or whether, not taking up too much, he walked without sufficient care over a slippery place; a barber exercising his trade in a place of public amusement, or where people passed constantly, he being liable in damage if, in consequence of a ball which is being played with by others hitting his hand, he injures the person who is being shaved; a pruner of trees or a mechanic who, while cutting

Examples of tort feasors.

branches, timber or other material near a public or private road, lets the substance fall without calling out to prevent accidents, and injures a passer by, or when not working near such a road deliberately lets the timber, &c., fall on a person whom he sees passing, or who, jumping down, comes on another and kills him ; a fire-watcher who sleeps at his post, if the fire, not watched carefully, burns down a house ; one who having a fireplace against a common wall lights a fire in it in such a way that the wall is injured ; one who fires at a bird sitting on a thatched roof or on a stack of wheat or hay, and sets it alight ; and generally whoever through any fault of his causes a conflagration, even if the fire creeping further afterwards caused damage to nearer or remoter neighbours [Voet 9. 2. 17 *et seq*].

If a person sets a light to his stubble or thorns, for the purpose of burning them down, and if the fire spreading damages or destroys a wood, vineyard, or crop belonging to some one else, and some negligence appears on the part of the person first lighting, as, when, it may be, he did this on a windy day or not having taken precautions to prevent the fire spreading, he is liable in damages. If, on the other hand, he had taken every precaution, or the wind suddenly came up, and carried the fire further, he would not be to blame [Voet 9. 2. 19]. He who digs pits or sets gins in a pathway (*iter*), without notice thereof to the public, for the purpose of capturing wild animals is liable for injury caused thereby to another's beast ; but if these contrivances be located where it is customary to have them, no action would lie [Voet 9. 2. 18].

Liability of occupants of houses.

Although a fire might arise in a house from the act of only one person, all and hence especially the master of the house are to be held liable *in solidum* for any injury to others, if they do not prove absence of fault on their part ; and so when the occupants in common of a room have the right of forbidding reckless persons

from entering it, they are equally liable for injury caused by things thrown out of a window by any one of the occupants. Any single occupant, however, who pays the whole damage may recover from the others their shares by the action *pro socio*, although, ordinarily, in the case of several persons who commit a delict any one of them who pays in respect of the joint delict cannot recover wholly or in part from the others, there being no partnership and community in delict [Voet 9. 2. 20].

If, however, in the case put above, at the time the fire broke out, there was only one person in the house, he alone is liable [Voet 9. 2. 21].

Person bringing on his land thing that may cause injury by escape.

One who for his own purposes brings upon his land, and uses or keeps there, anything likely to do mischief if it escapes, is *primâ facie* answerable for all the damage which is the natural consequence of its escape [*Baron v. Sinno*, 2 S. C. C. 90].

Aiders.

Those who are guilty of instigation, exhortation, assistance, or advice in respect of a tort are also liable under the *Lex Aquilia*, as, for instance, he who incites a dog to bite some one else, or so violently strikes a horse that the animal kicks and breaks a bystander's leg, or who drives a person's oxen into a narrow place, and so causes them to fall and injure themselves [Voet 9. 2. 25].

Injury by wantonness, folly, &c.

Certain acts arising out of mere wantonness, folly, or design and intention of injuring also gave rise to actions under the *Lex Aquilia*. Many of these are enumerated by Voet [9. 2. 26].

A person who pulls down neighbouring buildings in order that a fire may not reach his own premises, if the fire had already reached such buildings, is not liable for the injury thus inflicted ; and in the same way, one is not liable for damage occasioned by mere accident without fault, nor are children under seven or madmen liable for injury done by them [Voet 9. 2. 28, 29].

Accident.

The rule that fraud is never to be presumed against any person applies also to the case of fault [Voet 9. 2. 20]; and, as a general rule, where there is blame on both sides, that is, on the side of the injured and that of the party causing the injury, the latter would be liable if his fault was greater [Voet 9. 2. 17].

Owners of hackney carriages.

The owner of a hackney carriage is not liable for the loss of property which the hirer left behind in the carriage, unless it was left in charge, actual or constructive, of the driver who was the owner's servant [*Dalton v. Vanderstraaten*, 6 S. C. C. 74].

The person suffering the damage may elect to sue the immediate wrongdoer [Voet 4. 9. 5].

This action as against innkeepers is not available when the goods are not of the nature usually brought into hotels, &c., or if the innkeeper had given notice to the passenger that he would not be responsible for loss, and the latter had agreed to this, or if the hotel keeper had tendered the keys of the place where the goods are stored to the traveller, and the traveller had accepted them. The traveller, however, is not bound to accept [Voet 4. 9. 7]. If a sealed bag or box is received by an hotel keeper, and if he returns it closed as before, the presumption is that no theft was committed therefrom [Voet 4. 9. 8].

Hotel keepers bound to receive travellers.

It may here be mentioned that under the Roman-Dutch law, after hotel keepers, ostlers, &c., have once commenced voluntarily to keep inns, &c., they cannot refuse admittance to travellers except for good reason to be given by them [Voet 4. 9. 4].

Injury by animals.

For wrongs done by animals a person is liable, when his animal while unusually excited and fierce has injured any one, or when his animal has attacked another man's animal, and killed or wounded it. The owner of the animal that has done this is liable, but has the option of either making good the damage or giving up the animal [Grot. 3. 38. 10].

If a quadruped injures a person who has himself enraged it, there is no action against the owner or the person in charge of the animal. If some one else excited the animal, there is still no action against the owner, but an action lies against the person who moved the animal to cause the injury [Voet 9. 1. 4].

If an animal becomes enraged without being annoyed by any one, and causes damage, an action lies against its owner, even though the animal be one wild by nature but tamed or still wild, so long as it is in the possession of the owner [Voet 9. 1. 4].

Examples of injury by animals giving rise to liability.

The following particular examples of liability arising from damage by animals are given by Voet. A horse being taken by an ostler into his stables approaches a mare which, kicking up, breaks the ostler's leg. The ostler has an action in respect of the damage against the owner of the mare. Any one feeling or stroking a horse is kicked by him. An action lies against the owner, the mere stroking not being considered to be such an annoyance as should deprive the person of his remedy. Where a person, knowing the kicking propensities of a horse, mischievously and maliciously induces me to approach him, but does not otherwise do anything to the horse, an action in respect of any damage lies against the owner of the horse, although the person who persuaded me to approach can also be sued for his malicious act, if the owner is unable to pay, and the animal is not surrendered by him in satisfaction of the damage. When rams or oxen are driven together, and one kills another, if it is not known whose animal was the aggressor, no action will lie, but if this is known, and the one has been killed which did not commence the attack, an action lies. If the one which commenced the attack was killed, the owner of the other will not be liable. If one animal so annoys or excites another that the latter causes damage, an action will lie against the owner of

the beast which caused the annoyance, not of the one which physically caused the injury. No action accrues when quadrupeds not through any savageness but by mere accident cause damage, as when mules or horses drawing a wagon up an incline are not able to hold it, and the wagon happens to run backward, and crush a bystander, no action lies, so long as there was no concurrent fault on the part of the owner or driver [Voet 9. 1. 5].

Damage by accident caused by quadrupeds

As regards dogs—If one more than usually savage is kept unchained at an inn and bites a person coming in, an action would appear to lie, but not if the animal were chained up, for its being so restrained would be sufficient warning to avoid the dog as being savage. If a dog led by any one break away savagely and attack a person, or kill sheep, geese, &c., belonging to others, then, if he could have been held more firmly, an action would lie against the person leading him: but if when led by no one he does damage by being excited thereto by some one, an action would lie against the person so setting him on. If there was no blame on the part of the person leading the dog, and no one set him on, the owner will be liable in damage [Voet 9. 1. 6].

Injury by dogs.

It would appear that in South Africa the question of legal liability for injury by dogs is accorded exceptional treatment. In *Graham v. Viljoen* [Buch. 1878, 126] Sir Henry de Villiers says—"Considering the frequency with which damage is done by dogs as compared with any other domesticated animal and the difficulty of proving knowledge, even where it existed, I incline to the view of those writers who classed the dog with animals *feræ naturæ*. This state of the law might create occasional hardship, but it would obviate the still greater hardship which would result if an injured person can have no redress, unless he proves that the owner knew, before the injury was done, of the dog's

Law in South Africa as to liability for injury by dogs.

vicious propensity." From this it would appear, says Mr. Morice, that Sir Henry de Villiers does not regard Dutch law as going so far as the rule adopted in the Code Napoleon [sect. 1,385] which definitely lays down that the owner of or person using an animal is responsible for the damage caused by it. The learned Chief Justice seems to hold the view of English law that there can be no liability for loss caused to another without evil intention or negligence, except in the case of certain dangerous or mischievous things with which one deals at one's peril, but he differs from English law in regard to the things to be included in the latter class [Mor. Eng. and R.-D. Law, 226].

The right of *noxæ deditio.*

With regard to the primitive right of *noxæ deditio* or delivery of an animal that had caused damage to another, and thereby freeing oneself from liability, this appears in Dutch law to have been limited to those cases where the owner of the animal was not in fault. Some Dutch writers regarded the *noxæ deditio* as obsolete ; but Grotius, Van Leeuwen, and Groenewegen were not of that opinion. It may be assumed that the *noxæ deditio* is obsolete in South Africa [*Ibid.*].

Measure of loss by injury to animals.

Where injury is done to an animal or thing, the offender may be made to pay the highest value of the animal or thing during the month or thirty days preceding, the value being the market value and not the special value of the thing or animal injured to the owner [Voet 9. 2. 6]. Damages for the loss of use are also recoverable as far as they are certain ; and in the case of an animal, if it die, after the recovery of such damage, a further action lies for additional damage, if any, in awarding which the damage already awarded is to be taken into account [Voet 9. 2. 7].

Who may sue for injury by animals.

Action for damage done by animals can be brought not only by the owner of the thing damaged, but by any one having an interest in it and by his heirs against the person who, at the time the action is instituted,

possesses the animal by right of ownership, although at the time the damage was caused he was not the owner, since liability for the injury done accompanies the animal. It lies against the heirs of the owner as owners themselves. If there are more owners than one, each is liable *in solidum*, but payment by one released the others. The rule is the same if there are several heirs [Voet 9. 1. 7].

The injured party may sue for expenses incurred in having himself cured, for the amount which he might have earned by his labour, and for compensation for deformities, scars, pains, &c. [Voet 9. 1. 8].

Damage by animals.

Damage caused by animals is called *pauperies*, and is defined as *damnum sine injuria* on the part of the doer. If this kind of damage is occasioned by some person, whether it be the owner or a stranger, driving an animal upon the land of another, he is liable in damage to the latter. Where cattle stray owing to some negligence on the part of the owner and cause damage, he is likewise liable, but not if the trespass was due to some third person, even if unknown, who may have caused the animal to get out of a stable or private enclosure by opening a gate, fence, or the like. The damage includes expected gain lost. The owner may, however, free himself from liability by surrendering the animal which has caused the mischief [Voet 9. 1. 1].

The liability of the owner of the animal is the same where it enters into a storeroom or strays into a stack, and eats what has already been harvested [Voet 9. 1. 2].

Impounding trespassing animals.

A landowner whose crops have been injured by a trespassing animal may, when it is caught upon his premises, shut it up in a public pound, until the amount of the damage done has been paid or the animal surrendered instead, but he has no right to detain the animal in his own private stable [Voet 9. 1. 3; Grot. 3. 38. 11].

Remedy under Ordinance in case of trespassing cattle.

Ordinance No. 9 of 1876 amends the law relating to cattle trespass. It provides for the seizure and detention of cattle found trespassing on land fenced according to local custom, or on any land under cultivation, whether fenced or not, if the local custom prescribes no fence, and on irrigation works; and for the recovery of damage by the sale of the trespassing animal and by distress on the other property of the person liable [sect. 4 *et seq.*]. It further provides for licenses to be issued by government agents and police magistrates for shooting trespassing cattle. The licenses have force for only one month [sect. 14].

Licenses to shoot.

Destruction of trespassing pigs, elephants, and wild buffaloes.

No license is necessary to shoot trespassing pigs. The owner of the animal may remove the carcase, and where that is not done it may be sold by the local headman, and the proceeds paid to the nearest kachcheri to be carried to the credit of the general revenue [sect. 15]. A duly authorised person may shoot or otherwise destroy, at all times of the year and without any license, elephants or wild buffaloes found trespassing in or upon any irrigation work [sect. 16].

Summary of decisions.

The following are among the more important decisions of the Supreme Court on the subject of cattle trespass—

Owner of cattle unnecessarily injured entitled to substantial damage. Animals strangled to death by a noose or injured by a trap.

Substantial damages may be awarded to the owner of a trespassing animal which is injured by unnecessary violence and cruelty [Gren. Vol. III., 9]. The owner of an animal which is strangled to death by a noose set by the defendant on the land of a third party is entitled to damage [Gren. 1873, Part II., 20]. Where, however, a person sets up traps on his own land to catch trespassing cattle, he is not liable for any injury to cattle caused thereby [Vand. C. R. 182].

Land "under cultivation."

Land whereof the crop has been reaped is land still "under cultivation" under section 4 of the Ordinance [*Tiliam v. Arnolis*, 3 Br. 98].

Where a land is not fenced as required by Village Council rules, the owner cannot recover damages for cattle trespass [*Lamont v. Punchimahathmaya*, 2 Br. 238].

Where land is not fenced.

A caretaker of trespassing cattle is liable for damage done by them owing to his negligence when looking after them [*Obeysekere v. Podi Singho*, 1 Tamb. 78].

Liability of caretaker of cattle.

An owner of land who seizes cattle on it damage-feasant may avail himself of the common law right of distress. The remedy under the Ordinance is cumulative [Ram. 1877, 116]. The cattle may, under the common law, be seized and detained until the damage is paid [*Aroken v. Cooper*, Ram. 1863–1868, pp. 7, 62] in the owner's custody, there being no *publicum stabulum* in Ceylon [*Sangaravalo v. Gray*, Wendt 11. See also *Perera v. Perera*, 3 S. C. C. 51]. The cattle may be detained until reasonable compensation is paid, but not with the intention of recovering what may be called a punitive sum [*Molayon v. Roberts*, 1 Tamb. 4].

Common law right of owner of land trespassed upon.

The Cattle Trespass Ordinance has not taken away the common law defence that the land trespassed upon was not properly fenced [*Gunaratne v. Salmon*, 1 Tamb. 79].

Common law defence of absence of fence.

A person firing at and maiming a trespassing cow in a dark night, under the mistake and in fear that it was a leopard coming towards him, is not liable in damages to the owner [*Sittappu v. Sinnappu*, 3 N. L. R. 345].

Firing at trespassing cattle under mistake.

A person shooting trespassing cattle under a license which is void, acting, however, *boná fide*, in the belief that it is valid is not liable in damage [Ram. 1877, 399].

Shooting cattle under void license.

In an action for damage for cattle trespass the plaintiff is entitled to recover though he prove no damage at all, the rule in cases of tort of this nature being that a person is entitled to relief for the mere invasion of property. In such a case, if there are no circumstances of aggravation, nominal damages should be given, but if the wrongful act is done maliciously,

Plaintiff entitled to succeed in action for trespass though no damage is proved.

insolently, or with deliberate wilfulness, exemplary damages may and ought to be given, though no pecuniary loss has been caused [*Duncan v. Kiria*, Ram. 1863–1868, 18].

What damage owner of cattle is liable for.

The owner of cattle damage-feasant is liable to pay all damages which are the natural and probable consequence of his allowing his cattle to stray on another's land, but not damages which are the remote or accidental consequence of such act [Ram. 1860–1862, 19].

Where damage is caused by cattle of several owners.

Where the cattle of several owners cause damage by trespass, and the precise damage by each head cannot be ascertained, the total amount may be divided among the owners in proportion to the number of cattle of each [Vand. 51; *Gunaratne v. Porolis*, 4 N. L. R. 318].

Option of surrendering animal.

In an action for damage by trespassing cattle the owner of the animals has the option of either paying the amount of the damage or surrendering the cattle. If the owner of the land trespassed upon take proceedings under the Ordinance, he can recover the whole damage [*Silva v. Silva*, 1 Tamb. 9].

Liability of owner of dog.

The owner of a dog that has killed another person's swans or other birds is bound to make compensation, nor can he release himself by giving up the dog [Grot. 3. 38. 12].

Surrendering animal causing injury.

The owner of an animal causing injury was not under the Roman-Dutch law entitled to release himself from liability by surrendering the animal, if the owner was guilty of gross negligence, or the animal was wild by nature or known to be of a mischievous propensity, or if the animal destroyed was valuable [V. L. 4. 39. 9. See note on p. 324, Vol. II., Kotz-Tr].

Liability of owner of wild animal.

If a person has a wild animal or some other animal accustomed to do mischief, and does not keep the same well secured, and any one meets his death thereby, he will be guilty of homicide as far as regards the compensation [Grot. 3. 33. 6].

Where a person is not liable for injury caused by him.

But if a person without any negligence does a lawful act at a lawful place and in a lawful manner, and another meets his death thereby, he is not liable in compensation [Grot. 3. 33. 7].

Volenti non fit injuria

The maxim *volenti non fit injuria* is known to the English law. So, where a servant voluntarily takes on himself the risks involved in any work which he is required to do by his master, the latter is not liable for any injury the servant may sustain. The maxim, however, is not applicable in cases where the injury arises from the breach of a statutory duty [*Baddeley v. Earl Granville*, 19, Q. B. D. 423; *Yarmouth v. France*, 19 Q. B. D. 647; 17 C. R. C. 212].

Master not liable to servant for ordinary risks of service.

By the law of England, so far as not altered by statute, the master is not responsible to a servant for the ordinary risks of the service; and those risks include the negligence of fellow servants or other persons to whom the master has properly and without personal negligence committed operations or the furnishing of materials, through which the servant in the course of his duty suffers damage [*Priestley v. Fowler*, 3 Mee. & Wel. 1; *Bartonshill Coal Co. v. Reid*, 1 Pat. Sc. App. 785; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; 19 C. R. C. 102].

Non-exercise of ordinary care by person suffering injury.

A person is not entitled to say that he is injured by the negligence of another if he might, by the use of ordinary care, have escaped the damage. But although a plaintiff has brought himself into danger by negligence, if the defendant could by ordinary care have averted the danger, he is liable [*Butterfield v. Forrester*, 11 East 60; *Davies v. Mann*, 10 Mee. & Wel. 546; *Tuff v. Warman*, 26 L. J. C. P. 263; 19 C. R. C. 189].

Action in respect of public nuisance.

As to a public nuisance, in order that an individual may maintain an action for it, he must prove that he thereby suffers a particular, direct and substantial injury [*Benjamin v. Storr*, L. R. 9 C. P. 400; 19 C. R. C. 263].

Summary of decisions.

The following is a summary of the more important of the decisions of the Supreme Court on the subject of injury by and to animals—

Vicious animal must be secured.

Where the owner of a vicious animal has notice of its having done an injury or being accustomed to do mischief, he is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode of securing it adopted proves to be insufficient [*Manuel v. Naina*, Ram. 1843–1855, 65].

Liability of owner of dog attacking person on road.

Where a person quietly going along a public road is attacked and bitten by a dog, its owner is liable to pay him the damage so sustained, if it be proved that the animal is one of mischievous habits, that is, of so vicious and savage a disposition that it was improper for the owner to allow it to go at large in a public place [*Jacobs v. Perera*, 2 N. L. R. 115].

Where either person injured or animal was trespassing.

Where injury is done by an animal while trespassing, the owner is liable for the injury, whatever the nature of the animal, and whether or not the owner knows of its vicious propensities. Where, however, the animal is in its proper place, and the injured person has no right to be there, the owner is not liable. But where neither the animal nor the person injured is trespassing, the liability of the owner depends on the nature of the animal and of the knowledge of the owner as to its viciousness; that is to say, if the animal is *feræ naturæ* or even if it be *mansuetæ naturæ*, of a nature which is uncertain and capricious, the owner is bound to keep it in complete control, and if any injury is done, he is liable; but in the case of a domestic animal the owner is liable if he knows that it is vicious. In any of these cases the liability of the owner is not altered by the fact that the animal is in the custody of a stranger at the time when the injury is committed [*Soysa v. Don Charles*, 3 C. L. R. 43. See also Vand. 242].

Degree of liability of owner varies according to nature and habits of animal.

In the case of injury by a brute animal it is not necessary for the injured person to prove that the owner knew of the mischievous habits of the animal. Where the injury was not caused by mere accident or provoked by the wrongful act of the injured person or brought about immediately by the wilful act of a third person, the owner is liable. The degrees of liability vary according to the nature and habits of the animal and the circumstances in which the injury was inflicted. Where the animal is not of a genus naturally savage, and where the individual animal was not of mischievous habits, the owner's liability is limited to the value of the animal which did the injury. But if the animal was of a savage genus, or if, though not of a savage genus, it was of mischievous habits, whether the owner knew those habits or not, the owner must make full compensation for the injury done by the animal, and cannot limit the damage to be assessed against him by the amount of the animal's value [*Folkard v. Anderson*, Ram. 1860–1862, 68]. In *Thwaites v. Jackson* [1 N. L. R. 154] Bonser, C.J., thought that there was no justification for the proposition that the amount of compensation should not exceed the value of the animal which caused the damage where the animal is not of a genus naturally savage, and the individual animal was not of mischievous habits.

Having savage dogs on premises.

To have a savage dog not under proper control on one's own premises is not in itself a culpable act. It becomes so if the dog attack a person or animal being lawfully on the premises. Where, therefore, a fowl was found not lawfully on the premises of the owner of a dog, but trespassing thereon, and was killed by the dog, not being encouraged thereto by its owner or his servant, its owner, it was held, was not liable in damages to the owner of the fowl, although the dog was not at the time under proper control [*Rowlands v. Watt*, 2 N. L. R. 253].

Setting poison to kill trespassing animals.

Where a person set poison in the verandah of a dwelling-house in an enclosed yard in order to abate the nuisance of dogs continually trespassing thereon and disturbing the repose of the inmates thereof, and the evidence showed that dogs could not be enticed or attracted to the premises by the poison, and if they partook of the same and were poisoned thereby, they must have discovered it while already trespassing in the premises, it was held that he was not liable in damages in respect of a dog that had died from the effects of the poison so set [*Wijesinghe v. Templer*, 3 S. C. C. 1].

What damage owner of a calf killed by a dog is entitled to.

The owner of a pack of hunting dogs which killed a calf while standing loose on a high road is liable in damages to the owner of the calf. The damages may include not only the value of the calf, but also the loss of milk consequent upon its death [*Thwaites v. Jackson*, 1 N. L. R. 154].

Damage by collision of ships.

When two ships are lying together, and one runs aground or from some other cause cannot move, and the other is so close that danger may be expected, the party whose ship is aground, and cannot move may request the other who is afloat, and can move to weigh anchor so as to prevent damage; and in case of refusal he may himself take up the anchor, and if the other forbids it or hinders him from doing so, he will be liable to pay the damage resulting therefrom [Grot. 3. 37. 8].

CHAPTER II.

The Extinction of Obligations.

In the same manner as real rights are extinguished or lost in various ways, so there are also various ways in which obligations and the personal rights arising therefrom are lost, cancelled, or extinguished [V. d. L. 1. 18. 1].

Judicial extinctions of obligations.

Obligations, it may here be observed, are judicially extinguished by a final and definite sentence of a competent court. The sentence to be effective should not be one admitting of appeal or reformation, or if it is such, the time for such appeal or reformation should have passed, and it must remain unaltered by review. Even though a person after such sentence declares that he has discovered fresh evidence, it will afford no excuse, unless he was a minor, but judgments given upon the evidence of experts or in matrimonial causes, through error, or upon false evidence have not the force of a final and definitive sentence, when the error is discovered [Grot. 3. 49. 5].

Objection to jurisdiction.

The judgment must be of a judge having jurisdiction [Voet 2. 1. 19]. If the defendant without taking objection to jurisdiction takes time to answer or demands security from the plaintiff or takes a dilatory exception, he must be taken to have waived his objection to jurisdiction [Voet 2. 1. 22].

Exceptio jurisjurandi.

Exceptio jurisjurandi is a *quasi*-decree of court on the oath taken by a person with respect to a matter referred to his oath by his opponent in a suit [see Grot. 3. 50].

We shall now deal *seriatim* with the different means by which obligations are extinguished.

SECTION I.

PAYMENT.

THIS is the actual fulfilment of that which the party has bound himself to give or do [V. d. L. 1. 18. 1]. When the obligation is to do something, the payment of this obligation consists in the performance of what the person has obliged himself to do. When the obligation is to give something, the payment is the donation and transferring the property of that thing [Poth. 3. 1]. For a payment to be valid, it is not necessary that it be made either by the debtor himself or by some one on his behalf by his order. Payment is good by whomsoever made, although the person making it has not been authorised by the debtor so to do, or though he should do it even against his will; for, provided he does it in the name and on behalf of the debtor and provided he is entitled to transfer the property in the thing thus paid, it annuls the obligation, and frees the debtor even against his will [V. d. L. 1. 18. 1; *Cens. For.* 1. 4. 32. 3]. This, however, takes place only in obligations which consist in giving something, since where the obligation is to do a certain act, it may sometimes make a material difference to the obligee by whom this act is performed [*Ibid.*].

By whom payment may be made.

By whom an obligation to do something may be performed.

Payment, says Anson, may be the performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action. The performance of the original or substituted contract may be effected by the delivery of money, or of negotiable instruments conferring the right to receive money. In this last event the payee may have taken the instrument in discharge of his right absolutely, or

Payment as understood in English law.

subject to a condition [which will be presumed in the absence of expressions to the contrary] that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether these rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction of the breach of one [Ans. 291, 292].

Payment by person incapable of alienating property.

For the same reason that a payment would not be valid if the person making it were not the proprietor of the thing given, a payment by the proprietor would be inefficacious if, through any personal defect, he was incapable of alienating the thing. So, a payment is not valid if it is made by a woman under the power of her husband without authority, or by a minor who is under the power of his tutor [Poth. 3. 1. 1].

Where thing given as payment by person incapable of alienating is consumed by creditor.

Where the payment made by a person who is not the proprietor, or who is incapable of alienating, is of a sum of money or other consumable property, and such property is *bonâ fide* consumed by the creditor, the payment becomes valid [*Ibid.*]. And although the payment would not be valid, where the property was not transferred, the creditor, while he retains the possession, cannot claim any other payment. He must suffer an eviction, or offer to restore what he has received to the debtor [*Ibid.*].

Payment must be in name of real debtor.

Payment, as observed already, must be made in the name of the real debtor; otherwise, it will not be valid. Where a man pays, in his own name, a sum of money believing himself to be the debtor, when, in fact, he is not, the payment will not extinguish the obligation of the real debtor; and the person receiving payment is obliged to refund what is paid to him by mistake [*Ibid.*]. But where A in his own name pays B a sum of money which he did not owe B, out of the money and by the orders of C the real debtor, in an action by B against C, the latter could defend himself by making A a party to the cause, and obtaining a declaration that

the money do remain in payment of his debt to B; and if A sues B for repetition of the money paid, as money that A had not owed, B might have C, the real debtor, added as a party and claim judgment that the sum having been furnished to A by C be retained by B in acquittance of his debt [*Ibid.*].

Can a stranger insist on creditor receiving payment?

Whether a stranger who has no authority for the purpose either specially or by reason of his situation, nor any interest in discharging the debt can oblige the creditor to receive the payment which he offers in the name of the debtor is a question attended with some difficulty. Pothier infers from the texts he cites the rule that any tender made to the creditor by any person whomsoever in the name of the debtor is valid, and places the creditor "in default," when the debtor has an interest in the payment, so as to put an end to any action which the creditor may have commenced, or to stop the accumulation of interest, or to extinguish a right of hypothecation. If the payment offered would not procure any advantage to the debtor, and would have no other effect than to change his creditor, the offer ought not to be so regarded [Poth. 3. 1. 1].

Payment in case of obligations for doing something.

The principle that the payment may be made by any other person as well as the debtor is true with respect to obligations for giving something, for it is immaterial to the creditor by whom the thing is given, provided it be given effectually. With respect, however, to obligations for doing something, the rule, as observed already, is not universally applicable. It takes place where the act which is the object of the obligation is of such a nature that it can be of no importance to the creditor by whom the thing is done. If I contract with a husbandman to plough my land, another husbandman may discharge the obligation by ploughing it for him. But where the personal skill and talents of the party contracting the obligation are objects of consideration, the obligation can only be discharged by the

debtor himself. For instance, if I agree with a painter to take a likeness, he cannot discharge his obligation by causing it to be taken by any other painter, at least without my consent [*Ibid.*].

When debtor is entitled to a demand.

Under an ordinary obligation to pay money, the debtor is not entitled to wait for a demand; but where he is bound by the express terms of an instrument in writing to pay "immediately on demand," the debtor is allowed a reasonable opportunity for complying with the demand [*Toms v. Wilson*, 32 L. J. Q. B. 33; 21 C. R. C. 1].

There is a difference between the English and the Roman Dutch law as to the respective duties of the debtor and creditor relating to payment. The English law expects the debtor to seek out his creditor, and tender payment, while the Dutch law expects the creditor to come to the debtor, and demand payment [V. L. 4. 40. 6]. According to English law, if no place is fixed for payment, the debtor is bound to find or to use reasonable means to find the creditor, unless the latter be abroad. In Dutch law, when it is one of the terms of the agreement that the debt should be paid on a certain day, no demand is necessary to put the debtor *in mora*, as it is called, that is to say, to make him liable for interest. The fixed date takes the place of the creditor's intervention—*dies interpellat pro homine* [Mor. Eng. and R.-D. Law, 87; *Cens. For.* 1. 4. 32. 17].

Minor cannot make valid payment.

Whoever is incompetent to alienate his own property such as a minor is also incompetent to make a valid payment [Grot. 3. 39. 8, 11]. Pupils without the authority of their guardian and others who have not the power of alienation do not make a good payment, nor can they give possession to the payee, nor discharge the party paying by receiving his payment [*Cens. For.* 1. 4. 32. 8].

Surety may.

A surety may make payment of the principal debt, and discharge the obligation [render it null and void] [Grot. 3. 39. 10].

Payment by debtor in insolvent circumstances.

A debtor overburdened with debt may, before going insolvent, pay creditors who press him for payment [Grot. 3. 39. 12].

To whom payment is to be made.

Payment to agents, servants. &c.

The payment to be valid must be made to the creditor himself even against his will or his duly constituted agent. Payment to an agent whose authority has been revoked is good if made before the party making it became aware of the recall of authority [Grot. 3. 39. 13; V. d. L. 1. 18. 1]. Payment may be made to an attorney whether he holds a general power, or is merely appointed to get payment of the debt, but not to an attorney appointed for a lawsuit. Payment cannot be made to him [*Cens. For.* 1. 4. 32. 5].

Payment may be made to a servant who exhibits a mandate, signature, or receipt of the principal. Even if the signature were forged, the payment holds good, provided the debtor had reason for trusting the servant, or he had on other occasions paid him, or the servant had been accustomed to collect debts for the principal [*Cens. For.* 1. 4. 32. 7].

Meaning of creditor.

Payment to heirs.

The creditor here means not only the immediate person with whom the debtor has contracted, but his heirs and all those succeeding to his interest, even under a particular title [Poth. 3. 1. 2. 1]. Where the creditor has left several heirs, each becomes creditor only for that particular part for which he is heir, and a valid payment cannot be made to any of the heirs of more than his own portion, unless he has been authorised by his co-heirs to receive the whole [*Ibid.*].

Payment to assignee of creditor.

Any person to whom the creditor has transferred his rights whether by sale, donation, legacy, or any other title whatever, becomes creditor upon notice to the debtor of the transfer, or by the debtor assenting to the transfer; and consequently payment to any such person is valid. The original creditor ceases to have that character upon such notice or assent, and any subsequent payment to him has no effect [*Ibid.*].

After payment a debtor cannot maintain an action to compel his creditor to grant a valid receipt. He should tender a valid receipt, and if the creditor refuses to sign it, he should proceed as directed by the Stamp Ordinance [Gren. 1873, Part II., p. 8].

Debtor's right to valid receipt on payment.

Payment to a person not authorised by the creditor to receive it is good (1) when the creditor afterwards confirms it, (2) when the money paid is applied to the use of the creditor, and (3) when the person to whom it has been paid becomes heir to the creditor [V. d. L. 1. 18. 1].

When payment to unauthorised person is good.

Those who have not the management of their own property cannot lawfully receive payment. Hence a person who makes payment to a minor is not released thereby [Grot. 3. 39. 14.] unless the minor was by him and by all others regarded and treated as of full age [Grot. Tr. Maas. 502, n.].

Payment to minor.

Debtors to minors must make payment to their guardians, or, for still greater security, by order of the court or the orphan masters [Grot. 3. 39. 14].

Payment by debtor to minors.

The same is the case with respect to payments to a woman without the knowledge of her husband, even though the claim had been acquired by the wife alone without his knowledge [Grot. Tr. Maas. 502 n].

Payment to married woman.

But if the creditor or his tutor or curator under pretence of the nullity of payment claims payment a second time, and the debtor shows that the creditor has derived an advantage from the money paid, and that the advantage still subsits; as, by the discharge of debts, the repair of buildings or the like, the creditor is not entitled to enforce his claim [Poth. 3. 1. 2. 1].

Where creditor has derived advantage from money paid.

Payment to any person authorised by the creditor and on his behalf is deemed to be payment to the creditor himself, notwithstanding that the person authorised to receive payment is a minor, and cannot receive on his own account [Poth. 3. 1. 2. 2].

Payment to person authorised by creditor to receive.

Payment to a person under an authority to receive is only valid if made during the continuance of his authority. If the creditor has revoked the authority, payment is invalid, provided the debtor had been apprised of the revocation, or such notification had been given that he might have had himself apprised of it. Otherwise, the payment is sufficient [*Ibid.*].

Authority ceases with death of creditor.

Authority to receive payment ceases with the death of the creditor, or by a change of condition, as if the creditor who is a woman afterwards marries; but if the death or change was unknown to the debtor at the time of payment, the payment, if made *bonâ fide*, would be valid [*Ibid.*].

Payment to third person indicated by creditor.

Payment may be made to a person indicated by the creditor by the terms of the original agreement. Such a person is in a position different from that of one who has merely an authority from the creditor to receive payment. The authority of the latter ceases on revocation notified to the debtor; but in the case of a person indicated in the original agreement, the debtor may pay him notwithstanding even prohibition by the creditor, unless the creditor gives valid reasons for objecting to payment to the person indicated, and the debtor has no particular interest in making payment to such person [Poth. 3. 1. 2. 4].

When payment to person without authority to receive is good.

Payment to a person not indicated in the contract as the person to whom payment is to be made and having no authority from the creditor to receive payment on his behalf becomes valid (1) on subsequent ratification and approbation by the creditor, all ratifications having a retrospective effect according to the rule *ratihabitio mandato comparatur;* (2) when the payment has eventually turned to the profit of the creditor; and (3) if the person to whom payment has been made becomes heir, or has succeeded to any other title of the creditor [Poth. 3. 1. 2. 5].

Payment into court is where a debtor, payment having been tendered and refused, pays what he owes into court, and gives the creditor notice thereof [Grot. 3. 40. 2]. Payment into court.

This is equivalent to actual payment [Grot. 3. 40. 3].

No creditor is bound to allow payment by instalments. It must be made at the place mentioned in the obligation and at or before the time specified but not after [Grot. 3. 39. 9; Poth. 3. 1. 3. 2]. Payment by instalments.

Nor is a creditor bound to receive the principal only if tendered without the interest due upon it, unless, of course, by agreement or decree of court payment by instalments is allowed. Creditor not bound to receive principal without interest. When a debt is payable in certain number of instalments the amounts of which are not specified, it is understood that all the instalments should be equal, Instalments equal in absence of agreement. and when the agreement is that payment should be made at two different places, it is understood that a moiety is to be paid at each place, Payment at two different places. but if it is to be made at one place *or* another, the creditor is entitled to have the money in one payment at one place or the other at the option of the debtor [Poth. 3. 1. 3. 2]. At one place *or* another.

It follows, says Van Leeuwen, from the fact of discharge taking place upon payment of a debt and payment alone, that the whole of the debt ought to be paid, and the offer of a part does not discharge the debtor, unless different sums are owed, or a part of the debt is illiquid, or the law admits of the offer of a part, as in the case of heirs among whom the mere operation of law divides the obligation. Beyond these cases a part of the debt cannot be forced upon the creditor against his will, and the creditor is not bound to accept the principal without interest [*Cens. For.* 1. 4. 32. 10]. Payment of part.

A debt may be paid before the due date even against the will of the creditor, unless a day had been fixed in the interest of the creditor, as, for example, where payment of interest has been stipulated for until Payment before due date.

the date of payment of the debt [*Cens. For.* 1. 4. 32. 16].

Debtor may select debts to be paid first.

A person who is creditor of another in respect of different debts is bound to receive a payment offered by the debtor of any one, although he does not offer the payment of the others at the same time [*Ibid.*].

Rents of several years.

In the case of a debtor of rent for several years, the debtor is entitled to pay for one year only at a time without offering to the creditor the rent for the other years at the same time, the arrears for the different years in a case like this being so many different debts. The creditor, however, is not bound to receive the last year's rent before the first [*Ibid.*].

Payment to heirs of creditor.

When the creditor dies leaving several heirs, payment to one is only good as to his portion of the debt, unless he has been empowered by the co-heirs to receive the whole [V. d. L. 1. 18. 1].

Payment in case of assignment of debt.

In case of the assignment of a debt to a third person, with notice to the debtor, payment must be made to the assignee, and payment in such case to the original creditor is not good [V. d. L. 1. 18. 1].

Payment to third person.

Sometimes a clause is inserted in the contract whereby payment is conditioned to be made to a third person therein mentioned, and to be equally good as if made to the creditor himself [V. d. L. 1. 18. 1].

Payment on order of court.

Where a person has paid a sum of money under the sanction of a court of competent jurisdiction, the law will not compel him to pay it a second time to any person. The person who seeks to benefit by this principle must, however, have done all that was incumbent on him to resist the payment [*Mahamado v. Ibrahim*, 2 N. L. R. 36].

What must be given or paid.

According to the general rule the precise thing stipulated for must be given or paid, and the debtor cannot oblige his creditor to accept anything else instead. No creditor is bound to receive against his will a partial payment, unless by the agreement the

payment is to be made by instalments [V. d. L. 1. 18. 1].

Remitting money by post.

When a debtor is directed by his creditor to remit money by post, the posting of a letter enclosing the remittance as directed constitutes payment, although the letter be lost [*Warwicke v. Noakes*, 1 Peake, 67; 21 C. R. C. 14].

Effect of payment

The effect of payment is the extinction of the obligation and of all its consequences, as also the exoneration of all the co-debtors. The latter point, however, is subject to an exception when one of the several debtors or sureties pays under cession of action from the creditor against the co-debtors or co-sureties. Part payment extinguishes the debt *pro tanto* and also the interest [V. d. L. 1. 18. 1].

Part payment.

Payment in ignorance that debt was not due.

What one has ignorantly paid as a debt without being really indebted may be recovered from the person to whom payment has been made. If he paid knowingly, his act would be regarded as a donation, but whoever doubts or makes a mistake is regarded as ignorant even if he doubts or makes a mistake as to the law, unless there were equitable reasons for the payment [Grot. 3. 30. 4, 5, 6].

The payment should have been made by the person paying without being really indebted. This includes what we owed to a third person and paid to the wrong man, also a debt which, it being uncertain whether it will ever become due, is not yet due or of which the condition has not yet been fulfilled, as also a debt which another and not the person who paid it owed, if the payment was made in the name of the person paying [Grot. 3. 30. 8].

What has been paid can be recovered together with the fruits and profits deducting the expenses [Grot. 3. 30. 7].

Payment under a mistake of law.

An action to reclaim [*condictio indebiti*] is maintainable for a sum paid under a mistake of law [V. d. K. 796]. But if money is paid with full knowledge of the

circumstances inducing such payment, but upon a mistake of law, it cannot be claimed back [*Bogaars v. Van Buren*, Wendt 209. See further Vand. D. C. 28].

Where one pays what is due to another only by natural law.

When a person pays what is due to another by natural law, we have to consider whether municipal law declares such a debt wholly null and void, in which case recovery is allowed. If municipal law does not declare it wholly null and void, but only does not enforce it or merely provides a perpetual bar to it, we have again to consider whether the law does so out of antipathy to the creditor, in which case recovery is not allowed, or whether it does so out of favour to the debtor, in which case he is entitled to recover [Grot. 3. 30. 9].

Payment under judgment, compromise, &c.

What one has paid under a judgment, compromise, or oath or to the poor out of charity, even though he may assert that it was not due, cannot be recovered [Grot. 3. 30. 10].

Crediting of payments.

With respect to the crediting of the payments made, the following rules are to be observed—(1) The debtor when he makes a payment is at liberty to declare under what head or to what account he wishes it to be entered. (2) When the debtor neglects to do this, the creditor is at liberty, when he has different accounts against the debtor, to specify by his receipt the account to which he means to place it, provided he is reasonable, and does not appropriate the payment to what is uncertain and not due or to what is merely a surety debt when there is any debt certain and due by the debtor as principal. (3) When this is not specified by either debtor or creditor, it must be carried to that account which it is most beneficial to the debtor to reduce. (4) When the accounts are of the same nature, so as to make no difference to the debtor, the payment must be carried to the oldest account. (5) In case the debts are of the same date and of the same nature in every respect, then the payment is to be placed to the account

of each *pro ratâ*. (6) In debts which bear interest the payment must be applied in reduction of the interest in the first place, and afterwards to the principal [V. d. L. 1. 18. 1; Grot. 3. 40. 15; *Cens. For.* 1. 4. 32. 17].

The rules as to crediting payments were explained in the case of *Ephraims v. Jansz* [3 N. L. R. 142] as follows—

When nothing is settled at the time of payment, the principle that should actuate the creditor is that of the maxim, "Do as you would be done by." When there are more claims than one, the debtor or creditor should at the time of payment constitute with the consent of the other the claim in reduction of which the payment is to go. If no such appropriation is made at the time of payment, the creditor must apply it to some claims which could be enforced at the time of payment, and which at the moment is not in controversy. Of enforceable claims the most onerous one must be selected. If the claims are equal as to gravity and time, they must be rateably reduced by the payment.

To constitute a legal appropriation under the Roman-Dutch law either by debtor or by creditor, the appropriation must be made at the time of payment and not after. Where the defendant was doubtful as to such appropriation, and he was indebted on two promissory notes, on one as maker and the other as indorser, it was held that a payment made by the defendant should be appropriated to the former which was the debt more burdensome to the debtor [*Shockman v. Felsinger*, Ram. Rep. 1872–1876, 317].

Corollaries to rule as to application where none has been made by creditor or debtor.

The rule that when the application of a payment has not been made by the creditor or the debtor, it ought to be made to that debt which the debtor at the time had the most interest in discharging admits of the following corollaries—(1) That the application should rather be made to a debt which is not contested than to one that is; to a debt which was due at the time of

payment than to one which was not. (2) Of several debts which are due, the application ought rather to be made to the debt for which the debtor was liable to be imprisoned than to debts merely civil, in respect of which process could only issue against his effects. (3) Among civil debts the application should rather be made to those which produce interest than to those which do not. (4) The application ought rather to be made to an hypothecary debt than to another. (5) The application ought rather to be made to the debt for which the debtor had given sureties than to those which he owed singly. (6) The application ought rather to be made for a debt in respect of which the person who has paid was principal debtor than to those which he owed as surety for other persons. These corollaries are, however, subject to exceptions at the discretion of the judge [Poth. 3. 1. 7].

Appropriation in case of proceeds of hypothecated property.

When the creditor pays himself out of the price of a thing which was hypothecated to him, and which he has sold, the application ought to be made rather to the debt for which the thing was hypothecated than to those for which it was not; and when the debt for which it was hypothecated carries interest, the creditor may make the application to the interest before the principal. When the thing was charged as a security for different debts, the application is made to that whose right of hypothecation is strongest; for instance, to a privileged debt rather than to a simple hypothecation. Among simple hypothecations the application will be made to the debt of which the hypothecation was the most ancient. If the rights of hypothecation were equal, the application should be made proportionately [Poth. 3. 1. 7].

Consignation.

Of equal effect with payment is consignation of the debt or thing due, when payment has been tendered to the creditor and refused. The debtor is thereby freed, and the thing consigned or money paid into court lies

there on the account and at the risk of the creditor [V. d. L. 1. 18. 1].

Tender, says Anson, is attempted performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is frustrated by the act of the party for whose benefit it is to take place. Where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defence to an action by the creditor, does not constitute a discharge of the debt. The debtor is, under the English law, bound in the first instance "to find out the creditor, and pay him the debt when due" [*Walton v. Mascall*, 13 M. & W. 458. See p. 715, *ante*]. If the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into court. If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him; the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender. Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change [Ans. 292, 293].

Tender.

Payment into court.

In tender special terms of contract must be observed.

In England, Bank of England notes are legal tender for any sum above five pounds except by the bank itself [3 and 4, Will. IV. c. 98, sect. 6]. 29 and 30 Vict. c. 65 gives power to the Sovereign to proclaim that gold coinage of colonial mints should be legal tender

Legal tender in England.

throughout any part of his dominions specified in the proclamation. The coinage of the British mint is legal tender as follows—Gold coin, to any amount; silver coin, up to forty shillings; bronze coin, up to one shilling [33 and 34 Vict. c. 10, sect. 4].

In Ceylon.

In Ceylon, every currency note is legal tender for the amount expressed thereon in payment or on account of (1) any revenue or other claim to the amount of five rupees and multiples of five rupees, due to the Government of Ceylon and (*b*) any sum of five rupees and multiples of five rupees due by the Government of Ceylon or by any body corporate or person in Ceylon [Ord. No. 32 of 1884, sect. 7].

Tender of payment in sovereigns.

A tender of payment of money, if made in sovereigns which have been issued by His Majesty's Royal Mint in England or by any branch of that mint for the time being established, and have not been called in by any proclamation made in pursuance of the Coinage Act, 1870 [33 and 34 Vict., Ch. 10], and have not been diminished in weight by wear or otherwise so as to be of less weight than the weight specified or declared for the purpose by or in pursuance of the said Act is legal tender in Ceylon for a payment of any amount at the rate of one sovereign for fifteen rupees [Ord. in Counc. 26th Sept. 1901, proclaimed in *Govt. Gaz.* of 25th Oct. 1901].

Standard coin of the Island.

The silver rupee of British India of the standard weight and millesimal fineness specified in the first schedule to the Order in Council dated the 6th February, 1892, proclaimed in Ceylon on the 23rd June, 1892, to take effect from the 1st July, 1892 [see *Government Gazette* No. 5,149 of 25th June, 1892], is the standard coin of this Island and its dependencies; and the rupee of Portuguese India of the standard weight and millesimal fineness specified in the second schedule to the Order is to be treated as equal to the standard coin; and every contract, sale, payment, bill, note, instrument, and security for money, and every

transaction, dealing, matter, and thing whatever relating to money, or involving the payment of, or the liability to pay, any money is, in the absence of express agreement to the contrary, to be held to be made, executed, entered into, done, and had in the colony according to its standard coin [*Ibid.*].

Contract, &c., involving payment of money to be deemed to be made with reference to standard coin.

Subsidiary coins [representing fifty cents, twenty-five cents, ten cents, five cents, one cent, half a cent, and quarter of a cent] may be coined for the colony under the direction of the Master of His Majesty's Mint or at one of His Majesty's mints in British India of the weights and fineness specified in the third schedule to the Order; and each coin so coined is legal tender for the amount of its denomination [*Ibid.*].

Subsidiary coins, legal tender to the amounts of their denominations.

Each of the subsidiary coins mentioned in the fourth schedule to the Order is legal tender for the amount of half a rupee and a quarter of a rupee respectively [*Ibid.*].

A tender of payment of money in the colony if made in standard coins or in any coins specified in the second, third, or fourth schedules to the Order, is [provided that the coins have not been illegally dealt with, and provided that, in the case of silver coins, such coins have not been diminished in weight by wear or otherwise, so as to be of less weight than the weight, if any, specified as the least current weight in the schedules to the Order] a legal tender as follows—(*a*) In the case of rupees, for the payment of any amount; (*b*) in the case of other silver coins, for the payment of an amount not exceeding five rupees, but for no greater amount; (*c*) in the case of coins of copper or mixed metal, for the payment of an amount not exceeding one-half of a rupee, but for no greater amount [*Ibid.*].

To what extent tender of payment in standard or subsidiary coins is legal tender.

A coin is deemed to have been illegally dealt with where it has been impaired, diminished, or lightened otherwise than by fair wear and tear, or has been

When a coin is deemed to have been illegally dealt with.

defaced by having any name, word, device, or number stamped thereon, whether the coin has or has not been thereby diminished or lightened [*Ibid.*].

Acceptilatio.

Acceptilatio or discharge is an imaginary payment, by which what is owed is entered as received just as though it had actually been paid. It had to be done according to certain forms, but these have become obsolete, and it is now sufficient that it should be done in any words whatever which effect an acquittance. At the present day acceptilation or discharge and the agreement not to sue, which differed in this, that the former destroyed the obligation by operation of law, while the latter effected an acquittance only by way of exception are generally confused [*Cens. For.* 1. 4. 33. 1]. To this kind of agreement is conveniently referred the case where a document evidencing a debt is found cancelled in the possession of the debtor or the creditor just as though it were considered to have been tacitly agreed not to sue. If found in the possession of the creditor cancelled, the cancellation is presumed not to have been made except with his consent, but if found with the debtor, he might still be put to the proof of payment or the voluntary return of the document by the creditor [*Cens. For.* 1. 4. 33. 3].

SECTION II.

NOVATION AND DELEGATION.

THE Novation of debt is the creation of a new debt in place of an old one, either by taking a new and different obligation in extinction of the old one [whether this is done between the same debtor and creditor or whether a new debtor takes upon himself entirely my debt] or when the debtor, in order to be released from his original creditor, enters by his order into an obligation with a new creditor. The original obligation is thus discharged in such a manner that another obligation is substituted in its stead. This may be done by all persons competent to contract and with respect to all matters which may be the subject of contract [V. d. L. 1. 18. 2; Grot. 3. 43. 1, 2]. Where a new debtor takes upon himself my debt, he is called "expromissor," and the novation induced, *expromissio*. Definition. Expromissor.

If the debt of which it is proposed to make a novation by another engagement is conditional, the novation cannot take effect until the condition is accomplished, and so, if there be a failure in the accomplishment of the condition, there would be no novation. *Vice versâ*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement before the debt is extinct. Therefore, a novation is prevented from taking place, not only upon failure of the condition, but also upon the extinction of the original debt before the condition is accomplished [Poth. 3. 2. 2]. Novation of conditional debt. Novation by means of a conditional debt.

A mere term for payment is different from a condition. The debt exists though the term of credit has not expired. A novation may, therefore, be made of a Term for payment is not condition.

debt payable at a future day, by a pure and simple engagement, or of a pure and simple engagement by another engagement allowing a term of credit. In either case the novation takes effect at once, and is not postponed until the end of the term [*Ibid.*].

Novation may take place the moment an obligation is contracted.

Although it is of the essence of a novation that there should be two debts—an original and a substituted one—novation may take place the same instant in which the first obligation is contracted. For instance, A sells an estate to B, and by the same contract a third person—C—engages to pay A the purchase amount, and A accepts him as his debtor. Here, although there is no space of time in which any debt from B really exists, a novation takes place the same instant the debt is contracted [*Ibid.*].

Minors, &c., cannot novate.

Novation can only be made by those to whom a valid payment of a debt may be made. So, minors and married women cannot allow a novation in respect of what is due to them. One of several creditors *in solido* may make a novation [Poth. 3. 2. 3].

Creditors *in solido.*

How novation is effected.

Novation is effected in all the methods in which obligations are contracted, and particularly by action at law, for by action the parties are understood reciprocally to bind themselves to fulfil the judgment of the court [Grot. 3. 43. 3].

Will of creditor necessary to constitute novation.

In order to constitute novation, the express and declared will of the creditor to make a novation is requisite. Conjectures and suppositions are not sufficient, but a new contract or obligation is presumed in such case for the purpose of strengthening the original contract or obligation rather than of annulling it [V. d. L. 1. 18. 2].

Intention of creditor to effect novation.

The creditor need not declare in precise and formal terms his intention to make a novation. It is sufficient if his intention, however expressed, is so evident as not to admit of doubt. If, subsequent to the contracting of a debt, some act passes between the debtor

and creditor allowing further time, or appointing a different place for payment, or authorising a payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum, or the creditor to accept a smaller—in these and similar cases, in the absence of express provision, the presumption is that the parties intended only to modify, augment, or diminish the obligation, and not to extinguish the old debt and substitute a new one [Poth. 3. 2. 4. 2].

Where there is doubt as to intention.

If there is any doubt as to the intention of the contracting parties, no novation is presumed to have taken place, for instance, when an extension of time is granted, for thereby sureties and pledges are not considered as released which would be the case if there had been a novation [Grot. 3. 43. 4]. It would be otherwise where the prorogation is of an obligation contracted for a particular time [V. d. K. 835, 836].

Taking bill or note in satisfaction of debt.

The taking of a bill or note on account of a debt does not operate as a novation and extinguish the liability for the debt, but only suspends the remedy which revives, if the bill or note is dishonoured. But where the bill or note is taken expressly in satisfaction of the debt, the debt is extinguished, and the only remedy thereafter is on the instrument [*Arunasalem v. Veeravago*, 2 C. L. R. 143].

Agreement, to constitute novation, must in some respect be different from the original obligation.

In order to induce a novation by means of a new agreement between the same creditor and the same debtor, it is necessary that the agreement should contain something different from the former obligation either in the quality of the obligation, as if the former were determinate and the second alternative or *vice versâ*, or in the accessory parts of the obligation, as the place of payment. It is also a sufficient difference, if the original obligation was contracted with the security of a third party or secured by an hypothecation, and the new one is without a surety or

hypothecation or *vice versâ.* When the novation is made with the intervention of a new debtor, or of a new creditor, the difference of the creditor or debtor is in itself, and without any other difference sufficient to form a prôper novation [Poth. 3. 2. 4].

Novation by substitution of new debtor may be made without consent of original debtor.

A novation made with the intervention of a new debtor may be made between the creditor and the new debtor without the concurrence or consent of the original debtor whose debt is to be thereby extinguished [Poth. 3. 2. 5].

In *Saibo v. Teverayan* [4 N. L. R. 165 ; 1 Br. 190] the defendant having purchased the goodwill of S. S. & Co.'s business agreed with them to pay their debts mentioned in a certain schedule. The plaintiff, a creditor of S. S. & Co. whose name appeared in the schedule sued defendant; and it was held that the agreement was a novation, and the plaintiff was entitled to sue, the action being sufficient evidence of his assent to the novation.

Delegation or novation by substitution of new debtor.

Novation by the substitution of a new debtor is strictly speaking called Delegation or Transfer of debt. Here the original debtor is altogether released by the substitution of a new one in his stead. The debtor sought to be substituted must be willing, for no one can be compelled to make payment to any other than the person with whom he has contracted [Grot. 3. 44. 2, 3]. It must clearly appear to have been the intention that the first debtor should be released, and therefore an order to pay, though accepted, causes no transfer of debt [Grot. 3. 44. 5].

The new debtor may become obliged either to the original creditor or to a person appointed by him [Poth. 3. 2. 6. 1].

Intention to discharge first debtor.

To constitute a delegation, the intention of the creditor to discharge the first debtor and to accept the second in his stead must be perfectly evident [*Ibid.*].

Double novation in delegation.

In delegation is often comprised a double novation. The party delegated is often the debtor of the person

delegating, and the former, in order to be liberated from the obligation to the latter, contracts a new obligation with the creditor of the latter. In this case, there is a novation both of the obligation of the person delegating by his giving his creditor a new debtor, and of the person delegated by the new obligation which he contracts [Poth. 3. 2. 6. 2].

Error discovered after delegation.

It after delegation it be discovered that the person delegated was not in truth the debtor of the person who had delegated him, the former would still be liable to the new creditor, he having his remedy against the delegant. It would be otherwise, if the parties be in error as to the new creditor having been in fact a creditor of the delegant [*Ibid.*].

Delegant liberated by delegation.

When the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the insolvency of the substitute, unless it had been agreed that the debtor should at his own risk delegate another person. In that case the creditor may maintain an action against the delegant for any loss sustained by the insolvency, provided the creditor had not omitted using due diligence to obtain payment whilst the substitute continued solvent [Poth. 3. 2. 6. 3].

Insolvency of substitute.

Effect of novation.

The effect of novation is that the first or original debt is cancelled as effectually as it would be by actual payment, and, consequently, the mortgage or security for the debt, unless this be expressly transferred as security for the new debt. The sureties also for the old debt are not bound for the new without their express consent [V. d. L. 1. 18. 2].

Novation by one of several debtors *in solido*.

When one of several debtors *in solido* alone contracts a new engagement with the creditor as a novation of the former debt, all his co-debtors are equally liberated with himself. Novation of a debt also extinguishes all accessory obligations, such as those of sureties. The obligations of the other debtors and sureties may be

Accessory obligations.

preserved by its being made a condition of the novation. In that case, in default of their acceding to it, there would be no novation [Poth. 3. 2. 5].

Novation extinguishes hypothecations of old debt.

Novation extinguishes also the hypothecations accessory to the old debt, unless they are by agreement transferred to the second debt. Such transfer can only be effected with the consent of the person to whom the things hypothecated belong. Similarly, if one of several debtors *in solido* contracts a new obligation in favour of the creditor, reserving the hypothecations, such reservation can only affect the hypothecation of the goods of the debtor who contracts the new debt and not those of his co-debtors without their consent [Poth. 3. 2. 5].

Difference between delegation and transfer and simple indication of party.

There is a difference between delegation and transfer. It is also different from the simple indication to the creditor of a party who would pay the debt. The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties who makes the transfer to the other who receives it. The person having the transfer is, properly speaking, only the procurator *in rem suam* of the creditor. The transfer takes place between these two persons only without the consent of the debtor necessarily intervening. As to simple indication of person who would pay a debt—when I indicate to my creditor a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for the purpose, it is merely a mandate and neither a transfer nor novation. I remain the debtor, and the person designated by the order does not become debtor in my stead. So, where the creditor indicates a person to whom his debtor may pay the money, this indication does not include any novation. The debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication [Poth. 3. 2. 6. 4].

SECTION III.

Release.

Definition.

Release is where the dissolution of the obligation arises from the consent of the creditor, as for instance, by way of gift, when the creditor without any consideration releases the debtor from the debt [Grot. 3.41. 1, 5]. This may take place not only by express, but also by tacit agreement to be inferred from certain acts which raise this presumption ; for example, when the creditor returns to the debtor his acknowledgment or obligation, he is supposed thereby to have remitted the debt [V. d. L. 1. 18. 3 ; Grot. 3. 41. 10]. However, restoring the things given in pledge as security, though it releases them, does not release the debt itself [V. d. L. 1. 18. 3].

Circumstances in which presumptions as to release of debts arise.

The restitution of an article pledged for a debt is not admitted as a presumption of an intention to release the debt. An omission to except a particular debt in the release which is given for another debt affords no ground for presuming a release of that which is not mentioned. So, if there be a statement of mutual accounts, and one of the parties should omit to include a demand which he has upon the other, it is no presumption of that demand being released. It will rather be considered as an accidental omission which will not deprive the creditor of his right of recovering the debt, notwithstanding it is not comprised in the account. But such a presumption may arise (1) when the debtor and creditor are nearly related, or a great friendship subsists between them ; (2) when not only one but several accounts have passed without any notice of the demand ; (3) when the creditor has died, not having made any claim [Poth. 3. 3. 1. 2 ; 3 B. 846].

The release may be only a personal discharge of the debtor from his obligation, although, if he be the sole principal debtor, it indirectly effects an extinction of the debt; but if there are two or more debtors *in solido*, a discharge granted to one of them only liberates that person to whom it is given, but not his co-debtor, nor does it extinguish the debt, except as to the part of the person to whom the discharge was given, and then the other remains liable for the residue only [3 B. 847] But where a writing subscribed by several debtors *in solido* is restored to one of them, Pothier is of opinion that it is thereby to be presumed that the creditor intended to release all the debtors, and entirely extinguish the debt [Poth. 3. 3. 1. 2].

Discharge of one of two or more debtors *in solido*.

Discharge of principal or surety.

A discharge to a principal debtor operates as a discharge of his sureties; but a discharge of a surety does not discharge the principal debtor. A personal discharge to one surety does not discharge his co-sureties; but if the co-sureties were entitled to have recourse against the one discharged, as, when they had contracted their engagements contemporaneously with him, or after him, a discharge granted to him liberates them in respect of the part for which, after payment of the debt, they would have had recourse against him, if he had not been discharged [3 B. 848].

Renunciation of claim made to co-debtor or surety.

Renunciation of claim, whether made to one or more co-debtors or to a surety, says Grotius, discharges the debt, but if the promise merely applied to a particular person to the effect that the debt would not be demanded of him, it does not release his heirs or his co-debtors. As long, however, as the principal cannot be sued, the surety is also released [Grot. 3. 42. 9], although a release to the surety does not free the principal debtor any more than a personal release to one of the sureties frees the others [V. d. L. 1. 18. 3].

Release has effect of donation.

A release, except in the case of reciprocal releases, is practically a donation [Poth. 3. 3. 1. 2]; and by the

law of England it can only be by deed. A release, says Anson, is a waiver, by the person entitled, of a right of action accruing to him from a breach of a promise made to him. In order that such a waiver should bind the person making it, it is necessary that it should be made under seal. Otherwise, it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right. To this rule, bills of exchange and promissory notes form an exception. One who has a right of action arising upon a bill or note can discharge it by an unconditional gratuitous renunciation in writing or by the delivery of the bill to the acceptor [Ans. 324]. Law of England as to releases.

In Dutch law, a release does not require a consideration. There must be a *causa* as in the case of gifts. Generosity is a sufficient *causa;* and in the case of releases from debt generosity is readily presumed. Release requires no considera-tion.

Further, it is not necessary that a release takes any special form, Dutch law having in this respect made an advance upon Roman law which required a contract to be dissolved by the same formalities as those by which it had been formed. Grotius says [3. 41. 7.] that it is sufficient that one makes use of such words as involve the giving up one's right, and that such giving up should be accepted by the debtor or on his behalf. A release may also be inferred from acts inducing the presumption that the creditor has released the debtor [Mor. Eng. and R.-D. Law, 90]. How release might be effected.

Those who have not the management of their own affairs and those who are appointed to the management of the property of others without the right of making donations are incompetent to release by way of donation [Grot. 3. 41. 8]. Who are incompetent to release.

Releases or acquittances are of several kinds. Sometimes the entire debt is considered as released, and all the co-debtors freed; sometimes it only extends to one of the debtors, and the co-debtors remain bound. Different kinds of releases.

Thus, in the case of two persons being each a debtor, *in solidum*, for the same debt, or bound jointly and severally, the release to one frees him only, and not his co-debtor or co-obligor [V. d. L. 1. 18. 3].

Who may release a debt.

No one but the creditor himself, when he has the right of disposing of his property, can release a debt except those who are specially empowered by him for this purpose. An attorney acting under a general power, a guardian, curator, or administrator has not this right, since all such persons have only the power to administer and not to give away [V. d. L. 1. 18. 3]. But tutors and other administrators may release debts for purposes of composition with an insolvent debtor. That would be an act of administration rather than donation, and they may grant releases, provided they are not excessive, for the purpose of effecting exchanges of property. One of several creditors *in solido* may grant a release so as to discharge the debtor from all the others. It would have the same effect as a payment [Poth. 3. 3. 3. 1].

How far tutors and administrators may grant releases.

Release by one of several creditors *in solido*.

Release can only be made to debtor.

The release of a debt can only be made to the debtor. It is presumed to be made to the debtor, when the agreement which contains it is with his tutor, curator, or other administrator [Poth. 3. 3. 3. 1].

Release being a donation, it is requisite to its validity that the debtor to whom it is made be not a person to whom the laws forbid a donation to be made, unless it is made to give effect to a composition as observed already [Poth. 3. 3. 3. 2].

Release by persons in insolvent circumstances.

All releases of the whole or part of a debt as also any extension of time granted by persons who are virtually insolvent are null and void as being detrimental to the public good [Grot. 3. 41. 11].

Reciprocal release.

Reciprocal release is where the contracting parties mutually release each other, and return whatever may have been received [Grot. 3. 42. 1].

SECTION IV.

Set-off or Compensatio.

THIS is the reciprocal extinguishment of debts subsisting between the same parties by setting one against the other [V. d. L. 1. 18. 4]. Definition.

In order to constitute the right of set-off it is necessary (1) that it should be readily apparent that the one debt is of the same value and nature as the other. It takes place in the case of money against money, but not money against grain and of debts which the debtor may pay in money. Also in the case of things consisting in measure, weight, or number against like things, and also in the case of delicts and acts of negligence which are clearly equal, but not when the debt consists on the one side or the other in a single thing or in a particular kind of thing of which there are several qualities [Grot. 3. 41. 8-10; V. d. L. 1. 18. 4]. It is also necessary (2) that the debt brought in compensation or set-off has become due and payable; (3) that the debt be of a liquid nature; (4) that the debt be due to the party himself who claims the set-off; and (5) that the debt be due by the very person against whom we claim to set it off [V. d. L. 1. 18. 4]. What is necessary to constitute set-off.

Set-off may be pleaded, even after sentence, against the execution [V. d. K. 827].

Personal claims arising out of natural law, although not ratified by municipal law, may be set-off, provided municipal law does not prohibit such set-off or give an exception as against it; but, if a person has received anything in deposit or has unlawfully acquired possession of anything, or owes something to the Treasury of the State or of Towns, he may not set-off; and those who owe something to the State are not allowed to Set-off as regards things received in deposit and debt to State, &c.

set-off what they derive from some other source [Grot. 3. 40. 11].

Debts of determinate and indeterminate things.

The debt of an indeterminable thing of a specific kind, though not consumable, is susceptible of compensation. On the contrary, where a thing, although in its nature consumable, is due as a specific and determinate object, the debt is not susceptible of compensation. Thus, if A owes B a horse indeterminately, that is, without reference to any particular horse, and B becomes indebted to A likewise, the two debts may be set off against each other. But if A owes B a particular horse, or a quantity of wine from a particular vintage, and B contract an obligation to give A a particular horse or a quantity of wine from a particular vintage, the two debts cannot be set off against each other. There is, however, one case in which the debt of a specific determinate thing may be susceptible of compensation, that is, where A is under obligation to give B an undivided part of a specific thing, and B contracts an obligation to give A a similar share of the same thing. Here the two obligations may be set off against each other [Poth. 3. 4. 1].

Debt of a specific thing may be opposed to a general debt.

Although a debt of an indeterminate thing of a certain kind cannot be opposed to a debt of a certain specific thing of the same kind, it does not follow that the debt of a specific thing may not be opposed to a general debt of the same kind. For instance, A is B's creditor for six pipes of wine of a particular vintage and his debtor for six pipes of wine generally, B cannot set off the quantity due from A against the particular wine which is due from him to A. On the contrary, if B demand the six pipes of wine which A owes him generally, A may set off the six pipes which are due from B particularly. This compensation depends upon the choice of A; and it does not, therefore, take place until that choice is actually declared, whereas compensations which are made *quantitatis ad quantitatem*

take place immediately upon the debtor becoming also a creditor [Poth. 3. 4. 2].

Debts against which no compensation can be claimed.

There are some debts against which the debtor cannot claim compensation—(1) In the case of spoliation no compensation can be opposed against the demand for the restitution of the things of which any person has been plundered. (2) A depositary is not admitted to oppose compensation against a demand for restitution of the deposit. In the case of the deposit of a specific thing, such as a bag of money sealed, compensation would not be allowed, not only because it is a deposit, but upon the general rule that specific things are not susceptible of compensation. Where, however, credit arises from the deposit itself, as in the case of expenses incurred for the preservation of the thing deposited, there is a right of compensation even in the case of deposit of a specific thing which may be retained until the credit is discharged. (3) The debt of a sum of money given or bequeathed to one for his sustenance and with a provision that it is not to be seized by his creditors is a debt against which no compensation can be opposed. (4) In the olden time a feudal tenant could not oppose the compensation of a sum due to him from the lord against his obligation to go to pay him or send him the rent-service due at the accustomed time and place [Poth. 3. 4. 1].

Expenses for preservation of deposits.

Set-off as against corporations, public revenue, &c.

Compensation may be opposed not only against debts due to individuals, but even against debts due to towns, corporations, or communities, except in cases provided for by local acts. The law admits a compensation even against the public revenue upon condition, however, that both the debt for which the compensation is made and that opposed in compensation belong to the same department [*Ibid.*].

Exception to rule that debt sought to be set off must be due.

The rule that the debt opposed by way of compensation must be fully due is subject to the condition that a term of mere grace is not to be taken into account.

So, where a defendant has been allowed by the judge time to pay the amount of the decree, and before the expiration of such time he becomes the plaintiff's creditor on a separate obligation, the plaintiff may oppose in compensation the debt which the defendant owes him, although the time allowed as aforesaid has not expired [Poth. 3. 4. 2]. As to debts of a liquid nature, a debt is *liquidated* when it is evident that it is due, and to what amount, *cum certum est, an et quantum debeatur*. A disputed debt, then, is not liquidated, and cannot be opposed in compensation, unless the person who opposes it has proof at hand, and is in a situation to justify his claim promptly and summarily. Even if it be evident that it is due, if it is not clear to what amount it is so, and if the liquidation depends upon an account of which a long discussion would be necessary, the debt is not liquidated, and cannot be opposed in compensation [*Ibid.*].

Liquid debts.

Claim in the alternative at discretion of creditor cannot be opposed to single claim.

The debt to be opposed in compensation must be determinate. So, if a person charge his heir to give me a hundred pounds or his two horses, and I am indebted to the heir in the like sum of a hundred pounds. I cannot oppose the legacy to his demand, because the money is not due to me determinately, the heir having the choice to give me the money or the horses. If, however, the choice had been given to me, I might insist upon the compensation which would only attach upon my choice being declared [*Ibid.*].

Rights of sureties to set-off.

The rule that we can only oppose by way of compensation what is due to ourselves is subject to an exception in the case of sureties. A person required to pay a sum of money to which he is liable as a surety may oppose as a compensation not only what is due from the creditor to himself but also what is due to the principal debtor. But the principal cannot oppose to his creditor the compensation of a debt to his sureties [Poth. 3. 4. 2].

Where a creditor of a person transfers or assigns the debt, the debtor may oppose to the demand of the assignee not only what is due from himself, but also what is due from the original creditor, provided this debt had been contracted before the original debtor had notice of the assignment. But where a debtor assents to an assignment of the debt with full knowledge of the fact of the creditor's indebtedness to him on other obligations, he is to be deemed to have renounced his right of compensation as regards such obligations [*Ibid.*].

Set-off in case of assignment of debts.

The effects of set-off by operation of law are—

Effects of set-off by operation of law.

(1) That in case my creditor with whom I have deposited effects as a security afterwards becomes my debtor I can demand these effects back, provided I offer him the balance due to him.

(2) That when a debt carries interest and the debt to be set off against it does not bear interest, the debt bearing interest is extinguished to that amount, and the interest in the same proportion.

(3) That although my creditor is not bound to accept a partial payment, yet, however, when he becomes my debtor for a less sum than I owe him, he is obliged to abate his demand *pro tanto*, as the legal consequence of set-off.

(4) That having paid a debt already extinguished by set-off, we are entitled to recover back the money so paid, as not being due, unless such payment be made in satisfaction of a judgment [V. d. L. 1. 18. 4].

Compensation has effect *ipso jure*.

Compensation takes effect *ipso jure*, that is to say, by the mere operation of law without being pronounced by the judge or opposed by the parties. As soon as a person who is creditor of another becomes his debtor of a sum of money or other matter susceptible of compensation with that of which he is creditor. and, *vice versâ*, as soon as a person who is debtor of another becomes his creditor of a sum susceptible of

compensation with that of which he is debtor, a compensation is made, and the respective debts are thenceforth extinguished to the extent of their concurrence by virtue of the law of compensation [Poth. 3. 4. 3].

Although a creditor is not bound to receive payment of the debt due in instalments, yet, if he becomes debtor to his debtor for a less sum, he is obliged to suffer a partial discharge of his debt by virtue of compensation [Poth. 3. 4. 3].

Where A is indebted to B on several separate accounts, and he is B's creditor in a certain sum of money, the compensation ought to be made against that debt which it is most to A's advantage to discharge, provided it had been contracted before B's debt to him [*Ibid.*].

SECTION V.

Merger or Confusion of Claims.

Merger or Confusion of claims takes place when the title of creditor and debtor with respect to the same debt are united in the same person; for example, when one becomes heir to the other. By this event the obligation of the surety also becomes extinguished; for, as the principal debt or obligation no longer exists, the accessory obligation ceases also. But when the creditor becomes heir to the surety or *vice versâ*, the principal obligation does not thereby cease to exist. In order that this merger should take place, the party must be creditor or debtor for the entire debt; since, if he is such only for a part, the merger extends only to that part. In the same manner, if he is heir only to a part, the debt with respect to his co-heirs continues to exist as to their portions [V. d. L. 1. 18. 5; Grot. 3. 40. 4]. Definition.

The same consequences ensue when the creditor succeeds to the debtor by any title which renders him subject to his debts, and where the debtor succeeds, by whatever means, to the right of creditor. The same thing occurs when the same person becomes the heir both of the debtor and creditor or succeeds to both of them under any universal rule [Poth. 3. 5. 1].

When a creditor of two debtors *in solido* becomes the heir of one of them; or *vice versâ*, when one of them becomes heir of the creditor, the obligation of the other debtor continues to subsist. But where in the case of A and B—two debtors *in solido*—A, as between the two, has on payment of the debt by him a right of recourse to B for a part of the debt, and the creditor becomes heir of B, A would continue liable in Creditor of two debtors *in solido* becoming heir of one.

respect only of so much as the portion for which he had no such recourse; or in respect of the whole debt, if as between the two debtors, he was liable to pay the whole without recourse to B [Poth. 3. 5. 1].

Character of sole debtor and sole creditor must concur to induce confusion.

In order to induce a confusion of a debt, the characters not only of debtor and creditor, but of sole debtor and sole creditor must concur in the same person. If a person who was only creditor for part becomes sole heir of the debtor, the confusion and extinction can only take place with respect to the part for which he was creditor. *Vice versâ*, if a creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part [Poth. 3. 5. 1].

Where creditor is onè of several heirs of debtor.

If the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction takes place only in respect of the part for which he is heir, and for which he is liable to all the other debts of the succession. The demand continues to subsist against the others as to the parts for which they are respectively liable to the debts of the deceased [*Ibid.*].

Merger in English law and *confusio* in Dutch.

Strictly speaking, "merger" is the result [and it is in this sense that the term is used in English law] when of two contracts relating to the same subject-matter and between the same parties, the latter is of a higher nature than the former, as where a contract under seal takes the place of a parol contract. *Confusio* or *vermenging* of the Dutch law refers to the extinction of a debt by the debtor and creditor becoming united in the same person, as where the debtor becomes the heir of the creditor [Mor. Eng. and R.-D. Law, 91].

SECTION VI.

Loss or Destruction of the Subject of Obligation.

Destruction of subject of obligation.

The perishing or destruction of the specific thing bound as the subject of the obligation or its becoming *extra commercium* extinguishes the obligation, provided the loss of the thing or its character is entire, and is not occasioned by the act or neglect of the debtor or when he is *in mora*. If so occasioned, the debtor as well as his heirs and sureties is bound to make good the value [V. d. L. 1. 18. 6 ; Grot. 3. 47. 1, 3].

When things become *extra commercium*.

Things become *extra commercium* when consecrated to God or appropriated to purposes of burial. So also things which are permanently appropriated to the use of the State or of Towns become *extra commercium* as far as private individuals are concerned [Grot. 3. 47. 4].

There cannot be any debt, says Pothier, without something being due which forms the matter and object of the obligation. Whence it follows that if that thing is destroyed, as there is no longer anything to form the matter and object of the obligation, there can be no longer any obligation. The extinction of the thing due, therefore, necessarily induces the extinction of the obligation. For the same reason, if the thing which was due, in consequence of something that afterwards occurs, is no longer susceptible of being the matter and object of an obligation, the obligation itself cannot continue. That is the case where the thing which was due can no longer be an article of commerce [Poth. 3. 6. 1]. So, if you are bound to convey to me a certain plot of land which afterwards, under the

authority of the law, is taken for a common highway, my claim upon that plot of land would be extinct, it being no longer susceptible of being the subject of contracts [*Ibid.*].

Effect of object of contract not being susceptible of being due to creditor.

An obligation becomes extinct not only when the object of it ceases generally to be susceptible of obligation, but also when the thing due to a particular person is no longer susceptible of being so, although it may be susceptible of an obligation in favour of another person. For instance, you engage to procure a right of way for me to my estate over an adjoining field. Before the right is granted, I sell the estate without transferring the benefit of the contract. The claim is extinct, because the right of way can, in its nature, only belong to the owner of the estate [Poth. 3. 6. 1].

Difference in effect of loss and extinction of thing due.

There is some difference, as regards this mode of extinction of obligations, between the loss of a thing, so that it cannot be known where it is, and its having actually ceased to exist. If the loss takes place without any fault in the debtor, as when the thing is taken from him unlawfully by violence, the debtor is liberated as much as if the thing had no longer existed, with this difference, that as a thing once destroyed can never be renewed, the debtor is in that case absolutely liberated from his obligation; whereas the thing which is only lost may be recovered, and in this case the debtor is only liberated whilst the loss continues [*Ibid.*].

Alternative obligations.

In the case of alternative obligations, these are not extinguished by the extinction of one of the things due in the alternative, but the obligation which was before alternative becomes determinate in respect of the thing which remains [Poth. 3. 6. 2]. It is the same if one of the things due in the alternative is no longer capable of being due to the creditor, as if he become its owner upon a lucrative title. Here the obligation subsists as to the other. If, however, the

debtor had offered one of the things due in the alternative and the creditor is in default of acceptance, the extinction of the thing so offered would extinguish the obligation [*Ibid.*].

Obligations in respect of indeterminate things

The extinction of obligations by the extinction of the thing due cannot take place with regard to obligations of a sum of money, a certain quantity of corn or wine, or to obligations of an indeterminate thing as a cow or horse, not specifying any cow or horse in particular. There cannot be in this case any extinction of the thing due, as there can be no extinction of what is indeterminate. Where, however, the obligation is not absolutely indeterminate, but relates to a thing indeterminate in itself, constituting, nevertheless, part of a determinate set of things, it is extinguished by the extinction of all those things. For instance, if a person owes me one pipe of the wine which he has in his cellar, and there are a hundred pipes there, as long as any one remains the obligation subsists. If they are all destroyed, it is extinct. It would be otherwise where a person is obliged to give me a certain quantity of wine to be taken from his vault. Here the words "to be taken from his vault" are not restrictive, but demonstrative, and the extinction of all the wine that there may be at any particular time in the vault would not extinguish the obligation [*Ibid.*].

Extinction of thing due by fault of debtor.

As observed already, a debt is not extinguished by the extinction of the thing due, if it happen in consequence of an act or fault of the debtor or after he has made default. In either of these cases the obligation is converted into one for the restoration of the value of the thing that has ceased to exist, unless, in case of default on the part of the debtor, he has after such default offered the thing due to the creditor, and he by refusal to accept happens to be in default himself [Poth. 3. 6. 3 ; *Cens. For.* 1. 4. 39. 3].

Fault of co-debtor or surety.

Where a thing due has perished by the act or fault of a co-debtor *in solido*, the other co-debtors are liable; but if it has perished by the act or fault of a surety, he (the surety) will be liable, but not the principal debtor [*Ibid.*].

Of heir of debtor.

If the thing is lost by the act or fault of one of the heirs of the debtor, his co-heirs will not be liable, as heirs are not, personally, debtors *in solido* [*Ibid.*].

SECTION VII.

Lapse of Time.

Extinction of obligations by lapse of time.

Obligations are extinguished by lapse of the time for which they are entered into; for instance, if I become surety for any one on condition of not remaining bound beyond the term of three years. To this head also pertain all loans made upon annuities for lives which drop by the death of the parties for whose lives they were granted. In like manner, when an obligation is entered into on condition of lasting no longer than until the occurrence of a certain event, it is extinguished on the occurrence of such event; for example, in case I become surety for any one until a certain vessel in which he has considerable interest shall have arrived, the arrival of the vessel releases me from this obligation [V. d. L. 1. 18. 7].

Loan on annuity for life.

SECTION VIII.

PRESCRIPTION.

Extinction of obligations by prescription.

PRESCRIPTION is here treated on only as a means of extinguishing obligations. It extinguishes obligations in so far as that after the lapse of a certain time limited by law, the right of action on them is lost [V. d. L. 1. 18. 8]. It is more a release by operation of law, the debt, after the lapse of a certain time, being considered as discharged [Grot. 3. 46. 1].

Term of prescription under the Roman-Dutch law.

Under the Roman-Dutch law this limitation was generally fixed at the third of a century, though some authorities hold the period of thirty years as sufficient in personal actions. In yearly rents the mere lapse of thirty years without demand of payment was not sufficient to discharge the debtor with respect to those arrears which have not been due thirty years; for there are only as many prescriptions pleadable as there are years' rents due over this time [V. d. L. 1. 18. 8].

Minority, &c., as a bar to prescription.

Under the Roman-Dutch law periods of minority, of absence from the country, and such other obstacles to a person's suing were not taken into account in reckoning the period of prescription, whether these disabilities were existent at the commencement of the period or arose thereafter [Grot. 3. 46. 4].

Prescription as regards interest.

Overdue interest is legally prescribed with the principal as an accessory to the same [Grot. Tr. Maas. 514, n.].

Ordinance as to prescription of actions.

In Ceylon, Ordinance No. 22 of 1871 amends the laws regulating the prescription of actions.

Ordinance has no retrospective effect.

The Ordinance has no retrospective effect [*Mudianse v. Menika*, 8 S. C. C. 152]. The periods of prescription mentioned in the Ordinance are to be calculated until the "commencement of action." There is no difference

"Commencement of action."

between this expression and the expression "institution of action" in chapter 7 of the Civil Procedure Code, and the filing of a plaint in court is an act of the plaintiff by which he signifies that he has commenced an action [*Cave v. Erskine*, 6 N. L. R. 338]. In this case it was further held that where an irregular order of abatement was made in an action, and it was then restored to the roll, the term of prescription was not to be calculated to the date of restoration but to the filing of the plaint; while in an action in which the defendant being absent from Ceylon, the plaintiff took no steps to have the summons served, and an order of abatement was entered, and the action was again restored to the roll, it was held that the action must be deemed to have commenced when the order of abatement was set aside [*Murugupillai v. Muttelingam*, 3 C. L. R. 92 ; 3 S. C. R. 135]. It was further held in this case that where goods were sold on the 11th May of one year, and the action commenced on the 11th May of the next, the action could not be said to have been brought within one year, and the claim was prescribed.

Effect of order of abatement in an action.

Calculation of term.

Prescription may be pleaded *ore tenus*.

After the enactment of the Civil Procedure Code, it is competent to the court, where the existence of the statutory bar is made apparent at the hearing of an action, to recognise the bar *mero motu*, and refuse to proceed with the action. Prescription may, therefore, be pleaded to an action *ore tenus* at the trial, subject to the question of costs [*Arunasalam v. Ramanathan*, 1 C. L. R. 77 ; 9 S. C. C. 190]. As to the application of this decision to actions for the declaration of title to, or the recovery of, immovable property see p. 277 *ante*.

Plea by one defendant enures to benefit of others.

When several defendants are sued on an instrument, and only one of them successfully pleads prescription, such plea will enure to the benefit of those in default, but will not affect those who have consented to judgment [*Kandeperumal v. Kandeperumal*, 1 S. C. R. 142].

Prescription commences to run from the date of the cause of action, and so, in an action by a vendee of land against his vendor in consequence of eviction by a third party, prescription commences to run not from the date of the warranty but from that of the eviction, that being in fact the cause of action [Vand. D.-C. 241].

Prescription commences from cause of action.

Breach of warranty.

Where, in working a mine under a house, a party left insufficient support to the house, but no actual damage resulted until some years after the work had ceased, it was held that the cause of action accrued when the damage actually occurred, and not at the time when the act was done [*Backhouse v. Bonomi*, 9 H. L. Cas. 503; 34 L. J. Q. B. 181].

Damage accruing some time after the act.

Where the act constituting the cause of action is a fraud, and has been fraudulently concealed by the defendant, the time for limitation begins to run only from the time when the plaintiff discovered, or could by reasonable diligence have discovered, the existence of the cause of action. Where there is a confidential relation, such as partnership, between the parties, the latter alternative does not come into question [*Gibbs v. Guild*, 9 Q. B. D. 59; *Betjemann v. Betjemann*, 64 L. J. Ch. 642; 16 C. R. C. 233].

In case of fraud.

A trustee receiving money on behalf of his *cestui que trust* cannot set up a plea of prescription in bar of the claim of the latter [*Antho Pulle v. Christoffel Pulle*, 1 N. L. R. 120. See *Burdick v. Garrick*, L. R. 5 Ch. 233; *In re Exchange Banking Co.*, 21 Ch. D. 519; 16 C. R. C. 262].

Trustees.

Under the Ordinance, no action can be maintained for the recovery of any sum due upon any hypothecation or mortgage of any property, or upon any bond conditioned for the payment of money, or the performance of any agreement or trust, or the payment of penalty, unless the same is commenced, in the case of an instrument payable at or providing for the performance of its condition within a definite time, within ten years from the expiration of such time, and in all

Actions on mortgage bonds, &c.

other cases within ten years from the date of such instrument of mortgage, or hypothecation, or of the last payment of interest thereon, or of the breach of the condition [sect. 6].

Instrument with a promise to pay within a certain time.

It was held in *Markar v. Markar* [1 C. L. R. 40] that an instrument whereby the defendant, after acknowledging indebtedness in a certain sum of money, promised to pay the same within six months from the date thereof, and stipulated that, in default of payment within that period, the amount should be recovered with interest at a certain rate, and which professed to make a general mortgage of the debtor's property was not a bond within the meaning of this section, and that an action thereon would be prescribed in six years under section 7. In the case of a bond with a condition to pay on three months' notice in writing, it was held that limitation began to run only from the breach of that condition, namely, failure to pay on three months' notice in writing [*Ramen Chetty v. Ferdinands*, 2 C. L. R. 194].

Limitation on bond payable within a certain time.

Bond with general conventional mortgage.

A document executed in triplicate before a notary and two witnesses, whereby the person executing it acknowledges to have borrowed and received from the person in whose favour it is executed a certain sum of money, and promises to pay the latter the same with interest on demand, and binds all his property generally as security for the debt is a bond conditioned for the payment of money such as is referred to in section 6 of the Ordinance, and the period within which an action can be maintained on it is ten years. The document may be considered as a general conventional mortgage, and falling under section 6 of the Ordinance, notwithstanding the provisions of Ordinance No. 8 of 1871 [*Tissera v. Tissera*, 2 N. L. R. 238].

Partnership deeds, written promises, promissory notes, &c.

No action can be maintained upon any deed for establishing a partnership, or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security

not falling within the description of instruments set forth above, unless such action is brought within six years from the date of the breach of such partnership deed, or of such written promise, contract, bargain, or agreement, or other written security, or from the date when such note or bill became due, or of the last payment of interest thereon [sect. 7].

Deed containing promise to deliver movable property.

A deed containing a simple promise to deliver certain movable property within a given time falls within what, in this section is called a "written promise," and a claim thereon is prescribed in six years [*Kandeperumal v. Kandeperumal*, 1 S. C. R. 142].

Rent on notarial lease.

A claim for rent reserved under a lease notarially executed falls under this section and not under section 8, and six years' rent can be recovered [*De Silva v. Don Louis*, 4 S. C. C. 89].

Action to recover consideration on deed.

Where the owner of land conveyed the land to a purchaser, the conveyance purporting to be made for a pecuniary consideration recited as previously paid; and the vendor averring that it had not in fact been paid sued the purchaser to recover it, it was held that the action did not fall under this section, but was a simple action of debt, and barred by the lapse of three years under section 8 [*Thommasie v. Murugaso*, 5 S. C. C. 174].

Rent, money lent, &c.

No action can be maintained for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by the defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless it is commenced within three years from the date of the cause of action [sect. 8].

Account stated.

An examination of accounts between parties when the defendant attached his signature to the foot of the plaintiff's account sufficiently established a claim on account stated upon which the plaintiff could recover,

although the original debt for goods sold was prescribed [*Mohidin v. Walters*, 8 S. C. C. 99].

Money paid by vendee.

The action to recover money paid by a vendee to his vendor for land which the latter failed to convey to the former is prescribed under this section or section 11 in three years, the cause of action in such a case accruing at the time the purchaser fails to obtain possession of the land [*James v. De Silva*, 7 S. C. C. 129].

Right to redeem pledge.

The period of limitation against the right of action to redeem a pledge does not run so long as any debt remains due upon the pledge [*Flerk v. Jansz*, 9 S. C. C. 81].

Goods sold, shop bills, &c.

No action can be maintained for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same is brought within one year after the debt becomes due [sect. 9].

Sale of steam launch.

The word "goods" in this section means "movable property;" and so an action for the recovery of the balance purchase money of a steam launch, not registered as a British ship under the Merchant Shipping Act, sold and delivered cannot be maintained, unless brought within one year of such sale and delivery [*Markar v. Hassen*, 2 N. L. R. 218].

Goods sold on three months' credit.

Although money due for goods sold and delivered on three months' credit may be money due upon an unwritten promise, yet the action brought for the recovery of it falls under section 9 of the Ordinance, and as such is prescribed in one year after the debt became due [*Horsfall v. Martin*, 4 N. L. R. 70 ; 1 Br. 151].

Current account.

As regards goods sold by a tradesman to a regular customer, Lawrie, J., was of opinion that the action would be in time if brought within a year of the last article sold and delivered, although no payments had been made within the year ; and that the account

should be treated as a current account [*Mendis v. Mandris*, 3 Br. 133].

Actions in respect of salaries of clerks and superintendents of estates do not fall under this section [Gren. III., p. 7; 3 Lor. 115]. Wages of clerks and superintendent.

No action can be maintained for any loss, injury, or damage, unless the same is commenced within two years from the date of the cause of action [sect. 10]. Damages.

An action to recover damages for the unlawful conversion of property is barred under this section [*Williams v. Baker*, 8 S. C. C. 165].

No action can be maintained in respect of any cause of action not expressly provided for above, or expressly exempted from the operation of the Ordinance, unless it is commenced within three years from the date of the cause of action [sect. 11]. Cases not provided for above.

A claim for fees due to a schoolmaster for teaching a pupil under a verbal contract falls under this section, and not under section 9, "work and labour" under the latter section being manual labour [*Mack v. Wickremesinghe*, 2 Br. 114; 5 N. L. R. 142]. School fees.

An action to set aside a deed on the complaint of its being *inofficiosa* is barred after the lapse of three years under this section [*Karonchi Hami v. Angohami*, 2 N. L. R. 276]. Action to set aside deed as *inofficiosa*. Paulian actions are not specially mentioned in the Ordinance; and so an action to have a conveyance by a debtor in fraud of his creditors declared void falls under this section, and the period of prescription is three years. Paulian actions In such a case the cause of action arises when it becomes clear that the effect of the deed will be to defraud creditors: it does not necessarily arise at the time of the execution of the deed. It arises after all the rest of the property of the debtor not included in the impeached deed has been exhausted by the creditors, and when it has become quite certain that, unless the deed is set aside, there

will be no means of satisfying the debts [*Podisingho v. Louisingho*, 4 N. L. R. 81; 1 Br. 179].

Carriage hire.

A claim for carriage hire falls within this [11th] section of the Ordinance and not the 9th [*Walles v. Philippu*, Ram. Rep. 1872–1876, 103].

In case of reconvention or set-off.

No claim in reconvention or by way of set-off will be allowed, nor can it be maintained in respect of any claim or demand after the right to sue in respect thereof has been barred by any of the provisions given above [sect. 12].

Acknowledgment to take case out of the operation of Ordinance.

In any of the forms of action referred to in sections 6, 7, 8, 9, 11, and 12 of the Ordinance, no acknowledgment or promise by words only is evidence of a new or continuing contract, whereby to take the case out of the operation of these sections or to deprive any party of the benefit thereof, unless such acknowledgment is made or contained by or in some writing signed by the party chargeable, or by some agent duly authorised to enter into such contract on his behalf. Where there are two or more joint contractors or heirs, executors, or administrators of any contractor, no such joint contractor, or heir, executor, or administrator loses the benefit of these enactments by reason of any written acknowledgment or promise made by any other or others of them. The Ordinance does not, however, alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; and in actions commenced against two or more joint contractors, or heirs, executors, or administrators as aforesaid, if it appear at the trial or otherwise that the plaintiff, though barred by any of the provisions contained in the said sections, as to one or more of such joint contractors, heirs, executors, or administrators, is nevertheless entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given for the plaintiff as to such defendant or defendants

against whom he may recover, and for the other defendant or defendants against the plaintiff [sect. 13].

Terms of acknowledgment.

The following was held by the Supreme Court not to be an acknowledgment—" I called, but unfortunately found you away. Kindly forward per post Mr. E's [plaintiff's] bills, and should I not possess a receipt for the sum I will immediately remit you a cheque for the amount." An acknowledgment to take a case out of prescription must be such as to convince the court that the debt has not been paid or satisfied [*Eaton v. Lloyd*, Ram. 1863–1868, 155]. In *Brown v. Brabazon*, 5 S.C.C. 159] the defendant wrote as follows—" I thought that all accounts between us had been finally settled. Please let me have a memo. of plants sold by you ;" and it was held that this letter did not amount to an acknowledgment of debt so as to prevent prescription from running.

Parol statements in bar of prescription.

A mere parol statement by the defendant that the items of the account appearing in the plaintiff's shop ledger showing a balance against the defendant, in respect of which, however, the plaintiff's claim is barred, are correct with a parol promise to pay it will not support an action [*Fernando v. Aponsu*, 5. S. C. C. 169]. An acknowledgment to take a case out of prescription must not only admit the debt to be due, but must involve an unconditional promise to pay or a condition which has been fulfilled [*Appavupillai v. Ferdinand*, 1 C. L. R. 69].

English law as to acknowledgments, &c., in bar of prescription.

In England, the " acknowledgment " [by writing or part payment, &c.] which [by 3 and 4 Will. IV., c. 42. S. 5] is expressly made the event from which the extended time of limitation is to run in the case of specialty debts, need not be such that a promise to pay the debt is implied [*Roddam v. Morley*, 26 L. J. Ch. 438].

Part payment.

Part payment of a debt not already prescribed would arrest the progress of prescription [*Sathappa v. Ramen*,

5 S. C. C. 62]; but in *Murugupillai v. Muttelingam* [3 C. L. R. 92] it was held that part payment of a debt would not take the case out of prescription, unless the payment was made in circumstances from which an acknowledgment of the debt and a promise to pay the balance might reasonably be implied.

Oral statement of account.

An account stated may be settled orally, but an acknowledgment of the debt involved in an oral statement of account is insufficient to prevent prescription from running against the debt [*Saibo v. Baas*, 6 N. L. R. 216].

Payment by joint debtor.

In the case of a joint and several mortgage bond payments made by two out of three of the mortgagors prevent prescription from running in favour of any of them [*Uduma Lebbe v. Markar*, 5 N. L. R. 383].

Payment by heirs.

The effect, on the bar of prescription, of payment of interest by the heirs of the debtor was considered by the Supreme Court in 21,892, C. R., Kurunegala [Vand. C. R. 164], and the court there said—"If the defendants [heirs] have, as alleged by the plaintiff, continued to pay interest since the death of Punchiralle [debtor], the law will imply from such payments a promise to pay the principal debt, and such promise, though it would not bind them in their individual capacity, because it would be a promise to be responsible for the debt or default of another and is not in writing, yet it would, if made by them in their representative capacity, be binding on them in that capacity, and render them liable to payment out of the assets in their hands. Heirs in possession of their ancestor's property are, in this country, liable to payment of his debts out of his estate in the same manner as executors and administrators."

Payment of interest by surviving husband.

Where a mortgagee had taken a mortgage bond from a husband and wife whereby certain lands which were a portion of the common estate had been hypothecated, and the wife had died leaving children, it was held

that payment of interest thereafter by the husband kept the debt alive as against the wife's share as well in the hypothecated lands [*Gunawardene v. Gunawardene*, 7 S. C. C. 183].

Payment of interest, for the purpose of barring prescription, must be paid by the debtor or persons representing him; and so, where interest had been paid by a purchaser from a mortgagor of mortgaged property, it was held that that was insufficient to keep the bond alive as against the debtor thereon [*Executors of Clerihew v. Leechman*, 7 S. C. C. 192]. Payment by purchaser of mortgaged property.

Possession of land mortgaged by a bond in lieu of interest has of course the same effect as payment of interest as regards prescription [2 Lor. 38; Ram. 1877, 270], but where no interest has been paid, and there is no stipulation in the bond for possession of the mortgaged property in lieu of interest, it was held by a majority of the court that a parol agreement for such possession and possession thereunder could not be pleaded or proved in bar of prescription [*Mudianse v. Mudianse*, 2 N. L. R. 86. But see Ram. 1877, p. 19, *contra*]. Possession of mortgaged land in lieu of interest.

If at the time when the right of action in respect of any of the causes of action referred to in sections 6, 7, 8, 9, 11, and 12 of the Ordinance accrues, the person entitled to sue is subject to any of the following disabilities, namely, infancy, idiotcy, unsoundness of mind, lunacy, or absence beyond the seas, then the several periods of limitation aforesaid do not commence to run until the removal of such disability or the death of such person whichever may first happen; but no further time is allowed in respect of the disability of any other person [sect. 15]. Proviso in case of disabilities.

This saving clause in favour of minors applies even where guardians have been appointed over them [*Manuel v. Savarimuttu*, Ram. 1863–1868, 335].

In the case of *Sinnetamby v. Vairavy* [1 S. C. C. 14] it was held by a full bench that prescription having

once begun to run against the creditor on a bond was not interrupted by his death and minority of his heir. This case fell under the old Ordinance No. 8 of 1834. Following this decision, it has been held in the case of *Sinne Tamby v. Meera Levvai* [6 N. L. R. 50] that under the later Ordinance of 1871, even with regard to land, when prescriptive possession has once commenced against its owner, it would not be interrupted by his death and the minority of his heir. But it has been argued that, as to this matter of disability in consequence of minority, there is a difference between the old Ordinance and the new to which apparently the attention of the court was not drawn in the later case. In Ordinance No. 8 of 1834 there is only one section dealing with the two classes of cases, while in Ordinance No. 22 of 1871 there are two which, however, are not similarly expressed. Section 15, as its side note shows, deals with disabilities affecting claims other than those for lands, and it speaks of disability at the time when the right of action accrues. Under it, prescription would not commence to run if, at the time the right of action accrues, the person entitled to sue, whoever he may be, is a minor. Section 14 deals with disabilities with reference to claims for land, and it provides that, if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under disability, &c. Now, in the case of a minor heir, his right to sue first accrues on the death of his predecessor in title. So that, it has been contended that under Ordinance No. 22 of 1871, while in the case of a money claim prescription would not be interrupted by the minority of the heir of the creditor if the right to sue accrued in the lifetime of the creditor, in the case of land it would be interrupted on the death of the owner leaving a minor heir. This distinction was recognised by Bonser, C.J., in the course of the argument in the

Interruption of prescription by minorty. Difference between money claims and claims in respect of land.

case of *Bawa v. Serahami* [No. 766, D. C., Ratnapura. S. C. Civ. Min. 17th March, 1899. See also D. C., Negombo, 4,589, S. C. Civ. Min. 14th March, 1904]. The words—"but no further time shall be allowed in respect of the disability of any other person"—which occur in both the sections referred to above of Ordinance No. 22 of 1871 would appear to be adverse to the contention. It must, however, be noted that section 11 of Ordinance No. 8 of 1834 has not been repeated in Ordinance No. 22 of 1871. The question has been raised again before a bench of two judges in case No. 1,690, D. C., Kegalla [argued 19th July, 1904], and reserved for consideration.

The Ordinance does not affect the rights of the Crown, nor does it apply to any proceedings in any action for divorce, or to any case in which special provision is made for regulating and determining the period within which actions may be commenced against any public officer or other person [sect. 16]. Rights of Crown and actions for divorce and those specially provided for.

SECTION IX.

Accord and Satisfaction.

THIS is the delivery of something, with the consent of the creditor, in the room of that which is due, in satisfaction or redemption thereof. The creditor must ordinarily be paid in the same thing which is due to him, but as every one may renounce his right, so may the creditor agree that the debtor shall satisfy him by giving him something else, and this, when completed, is equivalent to payment [Grot. 3. 42. 4, 5].

This method of extinction of obligations is understood in the English law as an agreement substituting some other act for the act which has not been performed, and followed by performance of that act [Holl. Jur. 316].

Under English law.

Accord and Satisfaction, says Anson, is an agreement, not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. In order to have this effect there must not only be consideration for the promise of the party entitled to sue, but the consideration must be executed in his favour. Otherwise the agreement is an *accord* without a *satisfaction*. The promissor must have obtained what he bargained for in lieu of his right of action, and must have obtained something more than a new arrangement as to the payment or discharge of the existing liability. The satisfaction may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment; or of new rights against the debtor and third parties, as in the case of a composition with creditors; or of something different in kind to that

Satisfaction may consist in acquisition of new right.

which the debtor was bound by the original contract to perform; but it must have been taken by the creditor as *satisfaction* for his claim in order to operate as a valid discharge [Ans. 324].

Accord and Satisfaction cancels the obligation to which it relates, it being with respect to its effect of equal force with a sentence or decree in which both parties have acquiesced [V. d. L. 1. 18. 9].

SECTION X.

Restitutio in Integrum and Exceptio rei Pecuniæ.

Effect of *restitutio in integrum.*

THIS is a relief replacing the party in his original state before the contract, and it cancels the obligation against which the remedy is sought [V. d. L. 1. 18. 10].

Whence it was sought.

This restitution used to be sought from the Supreme Government in whose stead the Supreme Court acted, with *committimus* to the daily judge of the applicant. Proceedings had to be commenced within four years of the act complained against: although the remedy was. for good reasons, allowed even after that time [V. L. 4. 42. 3].

Van der Linden says that this remedy was by virtue of letters patent issued by the Court of Justice [*mandament of relief or civil petition*] addressed to the judge of the domicil who, after a previous suit at law and proper inquiry into the circumstances of the case, afforded this relief, provided there were good grounds which by law were limited to fear, violence, fraud, minority, absence, excusable error, and prejudice in above half the value of the thing; and further, such equitable grounds as might justify the reduction or cancellation of the contract [V. d. L. 1. 18. 10; Voet 4. 1. 26].

Parties restored to former state.

One party to a contract was thus restored to the same position which he had occupied before contracting the obligation, provided he restored the other party also to his previous position. This included the reciprocal restoration of fruits and profits enjoyed and compensation for damage. The remedy was obtained from the Sovereign by an application for the purpose [*mandament van relief*]. The relief was effectual against all who had profited by the obligation [Grot. 3. 48. 4].

Unless there was natural equity in an application for restitution which induced the granting of the remedy and showed the cause of the respondent to be an unjust one, restitution was not granted [Voet 4. 1. 1]. It is said to be an action for the re-instalment of a matter or cause in its original position. It was in the olden time an extraordinary remedy by which the prætor, by virtue of his authority and jurisdiction, following the dictates of natural equity, restored injured or circumvented persons, for just cause, to their original legal position, just as if the transaction by which they had been prejudiced had never taken place, or at any rate, ordered that they should be absolved from loss [*Ibid.*].

Restitution not granted, unless there was natural equity in favour of applicant.

Where restitution was sought with reference to some incident of a suit, as for instance, that the applicant might be permitted a fresh opportunity of proof, or to bring new facts to the notice of the court, the power of granting relief was allowed to the Provincial Courts in Holland, and, according to the better opinion, to even the inferior courts; but if relief was desired in respect of a principal transaction, as for instance, against a contract, restitution had to be sought from the Supreme Authority or those to whom the power had by it been delegated [Voet 4. 1. 3, 4].

Provincial and inferior courts might allow restitution in certain cases.

Generally, the Supreme Power.

So, in the case of arbitration, if the petition for restitution only related to matters incidental to the arbitration proceedings, as, for instance, that the applicant might be allowed a further opportunity of submitting evidence, it had to be submitted to the Supreme Court which had the power to issue a mandate on the arbitrator [Voet 4. 1. 6].

In matters referred to arbitration.

Injured persons were as a matter of *extra* caution allowed to protect themselves even against transactions which were *ipso jure* null and void [Voet 4. 1. 7; 1. 3. 16; V. L. Kot. Tr. Vol. 2, p. 344, n.].

Transactions *ipso jure* null.

Restitution was not usually granted if the injury suffered was only slight. The question as to the

Not granted if injury was slight.

gravity of the injury was left to the discretion of the judge [Voet 4. 1. 11]. Nor was restitution granted, if any other remedy was available to the petitioner, unless restitution was the more effectual remedy [Voet 4. 1. 13, 14. See *Carlill v. Rawter*, 1 Tamb. 18]. Where the Supreme Court refuses restitution, the applicant is entitled to a certificate under section 781 of the Civil Procedure Code for appeal to the Privy Council [*Dodwell v. Rawter*, 3 N. L. R. 325]. Restitution is not granted, except as a matter of extra caution, where the applicant was *ipso jure* protected, as for example, where, as already observed, a contract was in law invalid [Voet 4. 1. 13, 14]. The remedy was, as a rule, allowed to be sought only within four years of the cause of complaint or the attainment of majority by the party injured, and this period was allowed to run, although the person against whom relief was sought was absent from the country, provided he had left a "procurator" therein [Voet 4. 1. 15 *et seq.*; Grot. 3.48. 13].

Or if other remedy was available.

Remedy prescribed in four years.

By fear is meant fear such as fear of death, great pain, illegal imprisonment of one's self or family, &c. [Grot. 3. 48. 6].

Fear owing to which a contract may be avoided.

Fraud is wicked deceit practised for the purpose of defrauding a person. This remedy does not hold good where the obligation has been on both sides induced by fraud, for then it is null and void *ab initio* [Grot. 3. 48. 7].

When obligation is induced by fraud.

When this relief is granted, the sureties are also released [Grot. 3. 48. 8].

Release of sureties.

This remedy does not apply where contracts are entered into by minors without the assistance of their guardians, for these are null and void. It applies to those entered into with the assistance of their guardians, or which are contracted by the guardians alone [Grot. 3. 48. 10].

How far remedy is applicable to contracts by minors.

The relief might be applied for not only by the minors themselves but also by their agents and by their heirs but not by a surety [Grot. 3. 48. 12].

Relief on ground of *læsio enormis*.

Relief may be claimed from obligations on the ground of either party being damnified to the extent of more than half [*læsio enormis*]. By this, obligations are rendered invalid not wholly but in part, because it is at the option of the opposite party to abandon the contract altogether or to make good the deficiency [Grot. 3. 52. 1].

When relief may be claimed.

This relief may be claimed in cases of purchase and sale, letting and hiring, compromise, division of property, and all other kinds of contracts, except sales in execution or sales which are directed by last will to be made upon certain terms, or which are clearly accompanied by an intention to make a donation [Grot. 3. 52. 2].

Where there is a direction to sell below half price.

Where a testator has directed that his goods shall be sold at a certain price which is below half of the real value, this relief is not granted [Grot. Tr. Maas. 528, n.].

Value to be considered in connection with question of *enormis læsio*.

The value to be considered here is the value at the date of the contract [Grot. 3. 52. 3].

Minors entitled to this remedy even though damnified to less than half.

Minors even though damnified to a less extent than half have a right to *restitutio in integrum*. If, however, the time for that relief has elapsed, they may have recourse to relief on the ground of *læsio enormis* where they are damnified to the necessary extent [Grot. 3. 52. 4].

Where both parties wish to abandon contract.

If both parties wish to abandon the contract altogether, complete restitution takes place on both sides with all its consequences and consequently with discharge of the sureties in the same way as in the case of relief on the ground of fraud or fear [Grot. 3. 52. 5].

The law of Holland, in general, afforded equitable relief by means of *restitutio in integrum* in cases barred by the rigour of law [V. d. K. 796].

Although in transactions which are *ipso jure* void, such, for instance, as have been contracted in fraud or fear, it is usual for the sake of greater security to apply

for *restitutio in integrum*, yet this was not absolutely necessary. Upon proof of *læsio* the defendant should be absolved even without relief [V. d. K. 877].

Prescription of right.

The right to relief on the ground of fraud or fear was, under the Roman-Dutch law, not prescribed by the lapse of four years, but was perpetual, that is endured for thirty years [V. d. K. 881]. The same may be said of relief on the ground of minority where the minor had suffered enormous wrong [V. d. K. 900]. According to the correct rule under the Roman law the remedy in these cases was to be by action on the contract itself; but it had become the practice in the Dutch courts to proceed by way of petition for restitution [V. d. K. 901].

SECTION XI.

Cessio Bonorum.

How obtained.

THIS was an act of grace obtained from the Sovereign whereby a debtor was released from imprisonment, and ceased to be liable for his debts beyond the extent of his means [Grot. 3. 51]. It was simply the giving up of one's property to one's creditors. The debtor who had obtained this writ or had it interinated or confirmed before the judge of his domicil was not liable to the demands of his creditors further than as he might afterwards come to better circumstances [V. d. L. 1. 18. 11.] See further as to this remedy Grot. 3. 51.

Cessio bonorum abolished in Ceylon and insolvency procedure introduced.

Ordinance No. 6 of 1835 consolidated the laws then in force in this Island relating to the privilege of *cessio bonorum*, but Ordinance No. 7 of 1853 repealed that Ordinance, and provided that it should not be lawful for any person to obtain from any court within this colony, or for any such court to grant to any person, the "benefit or relief of cession of goods and property commonly called the *cessio bonorum*" as theretofore known to and allowed by the Roman-Dutch law in force within this colony [sect. 3], and further made provision for the due collection, administration, and distribution of the estates of persons who became insolvent, for the prevention of fraud affecting the same, and for the relief, generally, of such persons as by misfortune and without having been guilty of fraud or dishonesty became insolvent.

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